THE LAW AND PRACTICE OF POWER OF SALE FORECLOSURE IN ETHIOPIA

BY

ADAMU SHIFERAW ZELEKE

A thesis Submitted to the School of Graduate Studies of Addis Ababa University in Partial Fulfillment of the requirement For the Degree of LL.M. in the Faculty of Law.

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ABBREVIATIONS

A.I.B	Awash International Bank (S.C)
C.B.B	Construction and Business Bank
C.B.E	Commercial Bank of Ethiopia
D.B.E	Development Bank of Ethiopia

Construction and Business Bank V 1. Zone 2 Finance Office 2. Beyene Tsegaye, Federal Supreme Court Cassation Bench, Addis Ababa, civil case No 5034 (1994 E.C)

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Abstract

It has been alleged that judicial foreclosure, owing to its lengthy process has resulted in bad business culture, which in turn, has adversely affected the income of banks and the banking business in particular and the interest of the segment of the public who deposit money with banks in general. And the recent laws of power of sale foreclosure (proclamation No 97/1998 and 98/1998) have been issued believing that the issuance of these laws would redress the said problems.

The study analyzes and identifies the problems surrounding the laws and practice of power of sale foreclosure in Ethiopia.

The study concludes by recommending alternative solutions which would help not only collection of bank loans but that fairly serves all classes of creditors and debtors and enable investment and business to flourish.

CHAPTER ONE

Laws of Power of Sale Foreclosure in General

1.1. General Background

As is in many countries, litigation between creditors and debtors has always been a prominent feature of the Ethiopian scene. It is believed that the said litigation is as old as the practice of transactions undertaken between creditors and debtors itself. Though, what Ethiopia developed was an informal hierarchy of administrative and judicial arbiters, beginning with village elders, passing through various officials to the "chilot" of the emperor, even this legal system which did not have a developed regular and institutionalized class of judges and lawyers and the relatively underdeveloped state of laws have not permitted creditors foreclose properties mortgaged or pledged, where debtors fail to service their debt in due time, without the involvement of a court.

The transformation that Ethiopia has undergone from being an isolated and what was thought to be inaccessible country into a state striving in everything to be modeled after a modern state, has not also introduced sale of mortgaged or pledged properties by creditors without the intervention of a court.

"The law of loans", which was published in 1924/25, under its article, "a pledge", among other things, stipulates that it is only after the date of maturity of the loan that the borrower can give to the lender permission to take the property pledged to cover the loan or to sell the said property for non-payment of the debt. In the absence of such authorization from the borrower, it is only the court which may order the sale of the pledged property for the settlement of the debt.

According to this law of loans, any provision in the agreement of pledge purporting to give such permission in advance, that is to say, at the time of the loan or pledge agreement or after the loan or pledge agreement but before the loan matures, is invalid and of no effect.[1] This same law also provides that, should the mortgaged debt not be paid on the date of maturity, the mortgaged property may only be sold by the order of a court and the proceeds of the sale will go first and foremost towards satisfying the mortgaged debt.[2]

With regard to properties pledged to secure a debt, the civil code of Ethiopia, under its article 2851(1) stipulates that: "any agreement, even subsequent to the furnishing of the pledge, authorizing the creditor, in the event of non-payment on the due date, to take possession of the pledge or to sell it without complying with the formalities required by law shall be of no effect". The formalities, which the pledgee should comply with, seem those stated under article 2853, 2854, 2873, 2811(3), etc of the civil code. Before causing the pledge to be sold, the pledgee may give notice to the pledger that, upon default, he will cause the pledge to be sold.[3] Where, within eight days from the said notice, no objection has been raised or the objection is dismissed, the pledgee may cause the pledge to be sold by public auction.

The legal phrases "before causing the pledge to be sold" stated under article 2853, and "the objection is dismissed" inserted under art. 2854 should not at all be taken to mean that it is not the pledgee himself or a person authorized by the pledgee that undertakes the sale of the pledge. The pledgee should not be expected to move the court so as the court order the sale of the pledge.

After the debt has become due, unless the pledger and the pledgee agree that the pledger (the debtor) shall make over the pledge to the creditor (pledgee) in settlement of the debt, [4] it is not necessarily the court that orders the sale of the pledge. It is rather, according to the circumstances of the case, the pledgee himself, or the warehouseman, or any other person

licensed by competent government organ to undertake public sale and authorized by the pledgee, who may sell the pledge as envisaged under articles 2853, 2854, 2821, 2873, etc of the civil code cum articles 781(4) and 825(1)(d), etc of the commercial code.

What is, therefore, prohibited by article 2851(1) of the civil code with respect to the sale of pledge is making an agreement between the pledgee and the pledger in advance, at the time of the pledge agreement or even subsequent to the furnishing of the pledge in order the pledgee take possession of the pledge or to sell it without complying with the above mentioned formalities required by law where the pledger defaults. It should, however, be noted that the pledgee and the pledger, after the loan becomes due, can agree that the pledger shall make over the pledge to the creditor in settlement of the debt in the wordings of article 2851(2) of the civil code. Failing such agreement after the pledger has defaulted, the creditor may itself sell the pledge or cause it to be sold by a trustee as would thoroughly be discussed under the next chapter. One can, therefore, conclude that power of sale foreclosure was recognized by the laws of pledge contained in the civil code albeit the fact that the said power of sale is confined to pledge and does not emanate from a contract but due to the operation of the law.

With respect to properties mortgaged, the civil code, under art. 3060 (1), stipulates that any provision where by the creditor may, after the debt has become due, appropriate or sell the immovable without due regard for the conditions prescribed by law shall be of no effect, notwithstanding that such provision was made after the creation of the mortgage. Unless the mortgagor, after the debt has become due, agrees to transfer the ownership of the immovable (the mortgage) to the mortgagee, it is only the court that does have jurisdiction that may order the sale of the mortgage.[5]

Article 189(2) of the commercial code, like that of the civil code provisions on mortgage, prohibits the sale of a business mortgaged without complying with the requirements of the law.

The said requirements are provided under sub article 1 of the same article (189) which stipulates that a secured creditor, whose claim is not paid on becoming due, has a right to move the court to order attachment of the business with a view to causing it to be sold by auction, provided that the debtor has failed to pay the debt after a month of notice of demand of payment.

It would not, therefore, be difficult to safely conclude that the civil and commercial codes of Ethiopia, with regard to properties mortgaged to secure a debt, more or less, follow similar provisions of the before-mentioned law of loans.

The relevant provisions of the civil code and commercial code, cited in the above discussion, evidence the fact that Ethiopia was one of the judicial sale countries of continental legal system with regard to sale of mortgage. That Ethiopia belongs to the category of the judicial sale countries with regard to sale of mortgage has also been confirmed by writers who undertook a comparative research on the mode of enforcement of security.[6]

In 1997, A Proclamation To Amend The Civil Code, Proclamation No 65/1997, was issued with a view to enhancing collection of bank loans which could not be collected because of lengthy judicial foreclosure. The said proclamation, in order to empower banks to foreclose property mortgaged or pledged by themselves, made articles 2851(1) and 3060(1) of the civil code inapplicable for property mortgaged or pledged with banks. Even though, the said proclamation is entitled as "A Proclamation To Amend The Civil Code", it goes beyond amending the before-mentioned articles of pledge and mortgage and it provides that an agreement authorizing a lending bank to sell, by public action, a pledge or mortgage given to secure its loan, upon giving a prior notice of at least 30 days to the pledger or mortgagor and to transfer ownership of the pledge or mortgage to the buyer shall be valid. It also stipulates that the sale of the security by the lending bank shall be deemed executed by an authorized agent of the pledger or mortgagor. Moreover, it enshrines that the provisions of articles 394-449 of the civil procedure

code shall, mutatis mutandis, be applicable while the lending bank exercises its power to sell the pledge or the mortgage, and failing to observe the relevant provisions of the civil procedure code, shall make the selling bank liable for any damage sustained by the mortgagor or pledger.

The above-mentioned proclamation was found to be difficult to be implemented by the lending banks owing to the fact that, except some agreements of CBE, no mortgage or pledge agreements of banks to the date of this proclamation authorize banks to sell a pledge or mortgage and transfer the ownership of same to a buyer. On top of this, banks had no enforcement mechanisms to seize and / or dispossess the mortgage or pledge prior to or after the sale. Thus, proclamation No 65/1997, though, was in force for almost a year, without being used to sell a single mortgage or pledge,[7] was replaced by proclamation No 97/98, entitled "A proclamation To Provide For Property Mortgaged Or Pledged With Banks" with a view to overcoming the shortcomings of the replaced proclamation. Proclamation No 97/1998, which included almost all the provisions of the repealed Proclamation No 65/1997, brought into being the government organ namely "the registrar" which is said to be responsible for registering an immovable property or witnessing the signing of a contract of pledge and deposit same. The proclamation empowered the said registrar to take the necessary measure including to order police force for carrying out the sale of the pledge or mortgage.

Proclamation No 97/1998 has not only permitted banks to enter into a mortgage or pledge agreement that enables them to sell the mortgage or pledge when debtors default but also allows them to obtain and include the consent of the mortgagor or pledger in the mortgage or pledge agreement in order to have the ownership of the mortgage or pledge transferred to themselves for the value of the mortgage or pledge stated in the mortgage or pledge agreement, if the said mortgage or pledge cannot be sold at an auction for the second sale. Moreover, this same proclamation, surprisingly, allowed banks to sell property mortgaged or pledged with them by

public auction and to transfer the ownership to the buyer and where it cannot be sold after two auctions, to themselves, even in the absence of a mortgage or pledge agreement that empowers them to do so. This is a power of sale that obtains its validity due to the operation of the law and it is repetitive with regard to pledge since pledgees have already been empowered by the civil code to exercise power of sale over a pledged property.

The other proclamation is Proclamation No 98/1998, A Proclamation To Provide For Business Mortgage. This proclamation embodies most of the provisions of Proclamation No 97/1998 but deals with sale of business mortgage without the involvement of a court. Though business is a property and business mortgage is one of the several types of mortgage and could have easily been streamlined (consolidated) under proclamation No 97/1998, it has, perhaps, for poor draftsmanship, been issued separately.

1.2. The Purpose of the Laws and Causes of Default

1.2.1. Purpose of the laws

No one may tell us the rationale for which the before-mentioned laws were issued better than the said laws themselves, and therefore, let us resort to the preambles of proclamations No 97/1998 and 98/1998 that provide the said rationale. The preambles of proclamation No 97/1998 are quoted and put as they appear in the said proclamation here below:

> ...WHEREAS, it takes rather too long a time to obtain judgement, from courts of law, for sale of property mortgaged or pledged with banks and to subsequently have it executed;
>
> WHEREAS, consequently, banking business thriving on interest payment on loans it provides from public money received by ways of saving deposits or acquired from other sources, has been adversely affected;
>
> WHEREAS, in order to create a conducive environment to economic development by enabling banks to collect their debts from debtors efficiently and thereby promoting a good business culture; it is necessary to amend the civil code concerning the sale of property mortgaged or pledged with banks...

The first and the second paragraphs of the above quoted proclamation No 97/1998 is almost a copy of the first and the second paragraphs of the replaced proclamation No 65/1997. Notice, however, that the third paragraph of the preamble of Proclamation No 97/1998 is a bit different and wider than that of the third paragraph of the preamble of Proclamation No 65/1997. This is because, the third paragraph of the preamble of proclamation No 97/1998 includes (adds) the phrase "in order to create a conducive environment to economic development by enabling banks to collect their debts from debtors efficiently and thereby promoting a good business culture", which was non-existent under the preamble of Proclamation No 65/1997.

One can, therefore, notice from the above quoted preamble and the preamble of Business Mortgage Proclamation that, more or less, repeats what the preamble of Proclamation No 97/1998 states, that the need for the exercise of power of sale by banks has become of greater importance because of the then existing economic climate in which there was an increased inability on the part of a number of debtors to meet their monetary obligations stated in the loan agreement and the consequences of which has adversely affected not only the income of the banks that is mainly based on collection of interest on loans but also the interest of the entire segment of the society (the public) who have deposited money at their account held with banks; that the debtors were unwilling to service their debt due to absence of a good business culture.

One can, therefore, safely conclude that the very reason for the coming into being of the said laws is to make the provisions of the civil code and the commercial code that, do prohibit creditors to foreclose or transfer ownership of securities held to guarantee the repayment of the loan without the order of the court, inapplicable to banks and empower lending banks to foreclose property mortgaged or pledged without the need to resort to the lengthy judicial foreclosure.

The before-mentioned laws that empower creditor banks to foreclose properties mortgaged or pledged with banks without the intervention of a court are believed to enable banks to collect their loan efficiently and contribute to the prevalence of good business culture and therefore could create a conducive environment to the economic development of the country.

In this respect, CBE has taken the initiative for the promulgation of laws of power of sale foreclosure in this country in response to its borrowers' default. [8]

Let us, therefore, under the forthcoming section, consider some causes of default in light of which whether the purpose of power of sale can be achieved as intended.

1.2.2. Causes of Default

Dealing with causes of default of borrowers, at first glance, may seem a digression from the essence of the topic of this thesis. It has, however, been deliberately included with the view to assisting us understand the magnitude of the mismatch between the said causes of default and the response of the legislator that came up with the power of sale foreclosure as a remedy to such causes of default. The analysis is also essential owing to the fact that such an attempt, in one way or another, is tantamount to analyzing the provisions of the law itself so long as the laws under consideration clearly state that banks could not collect their loan by moving the court to order the sale of collateral (security) due to lengthy judicial sale and absence of a good business culture which presupposes only intentional default.

Borrowers of banks fail to repay and/or pay debts when it is due because of several reasons. Whether such failure on the part of the borrowers could be attributed solely to deliberate failure to perform a contractual duty is really a challenging issue that requires the judgement of banks and the government in whose jurisdiction these borrowers operate their business.

Identifying causes of default may enable creditors, the government and even the debtors themselves to seek the appropriate solution to the problem.

Due to principles of lending, almost all banks in this country, though in different degree as the nature and type of loans require, do undertake loan appraisal when considering an application of a borrower for a loan. The appraisal may range from ascertaining of facts filed by the borrower or his agent in loan application format prepared by the lending bank and visiting the business of the borrower to working out a detail feasibility study for those loan requests involving a considerable amount of medium or long term loans extended to support business investments.

It is this said appraisal that helps lending banks to make a decision as to whether to lend the requested amount of money or not. The appraisal raises a number of questions that must be considered and many that must be asked of the borrower before banks are in a position to make a decision. Some of the questions may not be difficult to answer if the borrower has been known for years and the bank is therefore aware of how well or badly the borrower has managed his business in the past.[9]

If the borrower is a fresh one, however, lending banks should, in their appraisal, consider the credit worthiness of the borrower, the purpose of the loan, the amount and the term of the loan, how and when the loan is to be repaid, and type and the nature of security for the loan, etc.[10]

In spite of the fact that it is after such an appraisal that banks do extend loans to their borrowers, borrower's default to repay the loan for various reasons, amongst which, the under-mentioned are worth to be noted.

1. Mismatch between earnings of the business and periodical installment payments.

This mismatch between earning of the business for which the loan has been granted and the periodical installment payment of the principal amount of the loan together with interest and other charges particularly in cases of long term loan is usually witnessed. Term loans are designed to fund long and medium term business investments, such as the purchase of equipment or the construction of physical facilities, such as, buildings, clearing farm land or construction of dams, etc. Usually the borrower applies for a lump-sum loan based on the budgeted cost of his proposed project and then pledges to repay the loan in a series of periodical installments[11] (payments may be made on equal annual or semiannual installments or every quarter or even monthly).

It has been said that such term loan repayments normally look to the flow of future earnings of the business, for which the borrower took the loan, to amortize and retire the credit. Hence, the schedule of installment payments is usually structured with the borrower in normal cycle of cash inflows and outflows.[12]

Despite the fact that the probability of default or other adverse changes in the borrowers position is certain to be greater over the course of a long term loan, banks in industrially developed countries grant 25-30 years of repayment period in order to enable the borrower repay the loan without being burdened by big amount of the periodical installment payments.[13]

Where banks, in developed nations, that have a better environment that permit them to undertake relatively dependable loan appraisal and where their borrowers also have a better market for their services or products because of the purchasing power of consumers, they grant to the borrowers a period of 25-30 years to repay a term loan; but in Ethiopia the maximum time granted to repay a term loan is only 15 years.[14] Notice that, due to globalization, borrowers,

borrowers who benefited from the extension of such loans have defaulted since most of them took the said loan for the business which they have never known before and the loan amount was much greater than what their business requires. On top of these, the supply of products or services by such borrowers were only demanded by few consumers who had the potential to purchase them.[16]

The other area of unwise and unhealthy competition amongst banks was related with the supply of money to borrowers who import consumer products and borrowers who manufacture same products here in Ethiopia.

DBE extends long term investment loans to borrowers in order they produce products such as edible oil, flour, leather shoes, rubber shoes, dry cell battery, soap, garments, plastic households, etc. Locally with the view to import substitution, CBE also extends short-term loans, particularly, working capital to these same borrowers for their same business. CBE, on the other hand, extends loans to its other borrowers who import the same products from companies that do same business in foreign countries. The local products, due to quality and cost of inputs of production and the disadvantage of small scale manufacturing that normally result in high cost of production, do fail to compete with the imported products. The imported products, owing to large scale production and other related benefits, have advantages over the local products.

By so doing, the state owned bank, CBE, defeats the purpose of its own loans and DBE'S loans and thereby causes the default of numerous loans. [17]

3. Natural or Manmade Catastrophe

Amongst the natural catastrophe, for the purpose of this thesis, draught shall suffice to be cited here. Agriculture is the dominant sector in the Ethiopian economy and is still the single largest sector and its performance has a significant impact on the overall performance of the

national economy.[18] It should, however, be noted that agricultural activities and producers are susceptible to many risks because of the fact that agriculture in this country still is dominantly rain fed. Whenever draught exists, borrowers engaged in agricultural investments, vis, coffee plantation, cereals growing, cattle fattening, dairy, etc, do face a serious problem and do fail to repay their loans.[19]

Amongst manmade catastrophes, war plays a negative role in a country's national economy. The Ethio-Eritrea war has affected all businesses in Ethiopia, in general, and businesses in northern Ethiopia, in particular. Specifically, hotel and tourism undertakings in the northern part of Ethiopia have seriously been affected by the war and matters related with the said war due to tourists' hesitation to reach these areas during the long periods of the war and even after the war. And, hence, many investors in hotel business who borrowed money from banks have failed to repay their debts because of the war and matters related with the consequences of the war.[20]

4. Illness and Subsequent Death

As many businesses in Ethiopia are dominantly owned and managed by soul proprietors, banks, before they decide whether to grant loan or not, do asses, among other things, the character and managerial capability of the prospective borrower. It is where the assessment reveals that the prospective borrower has suitable character and managerial capability to run the specific business for which the loan is to be granted, that banks do recommend and approve loans.[21] Unlike business organizations whose existence is perpetual, unless dissolved for some reasons, individual human beings, on the basis of whose character and managerial capability the loan is extended, may pass away before the loan is settled.

Death of borrowers has been one of the serious problems encountered by banks now-a-days. Since the mid of 1990's death rate of borrowers, never heard before, has been reported to the management of several banks. It has been learnt that at only Nekemt branch and Debremarkos branches of DBE and CBE, over 30% of individual borrowers have died and due to which almost all businesses whose owner managers have died have failed. The wives of the deceased's or the children of the deceased's who attain legal majority, in most instances, have neither the skill to run the business nor are interested in the business at all or may also be ill to undertake the management of the business.[22] Thus, one can boldly say that death is one of the main causes of default for borrowers of bank loans.

5. Willful Default

Willful default may reveal itself in several ways. Some borrowers' default is intentional and a planned one even prior to the withdrawal of the loan amount. Although one of the principal responsibilities of banks in this country is assessing the collateral aspect of a loan request, many borrowers do escape such an assessment quite easily. As can be understood from the lending policy of several banks, it is only a few borrowers who may borrow unsecured, with no specific collateral pledged or mortgaged behind their loan except their reputation and ability to generate earnings. Most of the borrowers, however, are usually asked to pledge or mortgage their asset for the repayment of their loan.[23] Nonetheless, a number of borrowers due to undue collaboration with some property valuers and some officials of banks produce fixed assets the value of which is much lesser than the loan amount requested and get the said loan without much difficulty. [24]

Some borrowers even do not pledge or mortgage their own property, rather they produce other persons' property by merely offering the said other persons insignificant amount of money to obtain their consent. [25] By so doing, borrowers defeat the very purpose of collateral at the

outset. Here, it should be noted that getting a pledge or mortgage of the borrower's assets as collateral behind a loan really serves some purpose for a lender. If the borrower cannot pay, the pledge or mortgage of collateral gives the lender the right to cause the sale of those assets designated as loan collateral, using the proceeds of the sale to cover what the borrower did not pay back. Collaterization of a loan gives the lender also a psychological advantage over the borrower, it is because specific assets may be at stake and hence the borrower feels more obliged to work hard to repay his loan and avoid losing valuable assets.[26] Borrowers, who do not produce their own property for collateral or who produce their own property as collateral whose value is not equivalent to the loan amount withdrawn, deliberately abandon their business and then the loan defaults.

Some category of borrowers' intentional default is accomplished by diverting the loan from the purpose for which it has been granted. Borrowers sometimes acquire a plot of land outside Addis Ababa where acquisition of a plot of land is not difficult and the amount of money for the acquisition is not as big as here in Addis. They produce the title deed of the said plot of land along with their business plan and business license to banks for the latter's appraisal of their loan request. Though the loan approved may be disbursed in several phases, borrowers, for instance, engaged in cattle fattening, meet the requirement of the first disbursement by simply showing a shade and fences and also few oxen which are not their own to the bank's officials. Conditions for other disbursements of the loan also would easily be met, for instance, by showing agreement reached to purchase inputs to the cattle fattening business. After the entire loan amount is disbursed, even without undertaking a single business cycle of the project, borrowers abandoning the business for the purpose of which the loan is granted start other types of business in other persons' name. As the collateral for such kind of loan could be the asset of

the project itself or a collateral produced by a third party in a manner discussed above, the loan would default.[27]

Diverting bank loan could take also another form. Borrowers, who planned new business establishments, may be required to carry out building construction or acquire equipment or both. Borrowers, for example, by showing to valuers only heaps of stone will be entitled for the first loan disbursement as if they have fully met the utilization of 30 (thirty) percent of the project cost from their own source and which is usually stated in the loan agreement as a condition for the first disbursement. These borrowers may also utilize half percent or so of the first bank loan disbursement for the project diverting the balance for their other businesses. The valuers will confirm that the borrower has fully used the bank's loan first disbursement for the project and the borrower would be entitled to other disbursements in the same manner like that of the first and second disbursement.[28]

In cases of purchase of equipment, some borrowers collaborate with the supplier abroad or here in Ethiopia. Over-valuing the invoice by any percent is very common. The bank releases the loan earmarked for the purchase of the equipment against the invoice submitted to it. Thus, borrowers who engage in such deceitful practices usually default for the simple reason that since they have already benefited from the loan and since their projects are under-capitalized believing that it will never be successful, they deliberately abandon it.

Some borrowers, filling many sacks with hay, show it to a bank's loan officers as if it were coffee purchased by their own contribution and get working capital loan worth in millions from banks owing to undue collaboration with bank loan officers and then after even flee the country. Many of such kinds of loan, no doubt have not been repaid.[29] There are some exceptional instances where borrowers fail to pay their loan where their business generates adequate income to repay a debt.

6. Wrong Advice Given by Banks

As many banks, pursuant to their objective, provide business advice, negligent advice has obviously occurred in the range of matters in which banks have become involved. For instance, failure to pass on information when banks shoulder the task of advising a potential borrower about the attendant risks of a particular investment; statements by the banks that they will make available to a borrower adequate funds to undertake a business project and advice about investments and also assurances that business plans are heading in the right direction.

Even though there is a distinction between a bank simply passing on information about, for example, a potential investment and a bank actually giving advice on that investment, in Ethiopia, no bank, so far, has incurred liability for advice given even where the said advice is related with actual advice on the investment and the said advice has found to be a cause for the failure of the investment. Hence, banks, particularly, that provide investment loan are so negligent and some borrowers have defaulted owing to such an advice.[30]

To summarize, causes of default are not exclusive, rather, they are interrelated. Whatever cause of default may be, banks do blame their borrowers whose loan have been in default. The remedy for default should take into account, above all, the nature of the cause itself if there has to be genuine effort to over come the before-mentioned causes of default on the part of banks, the government and the defaulting borrowers themselves.

The writer of this thesis is of the opinion that the remedy for the before-mentioned causes of default should be all rounded and the formulation of which should be based upon the nature of causes of default, as it has been attempted to recommend at the end part of this thesis.

1.3. Scope of Laws of Power of Sale Foreclosure

Under this section, we will discuss, very briefly, how the recently proclaimed laws of power of sale foreclosure are put for the benefit of lending banks only and for a limited purpose.

To begin with, where viewed from creditors' perspective, as it can be understood from the provisions of articles 3 and 4 of Proclamation No 97/1998 and article 13 and 14 of Proclamation No 98/1998, it is only banks that are empowered to exercise power of sale foreclosure in the present day legal system of Ethiopia. Creditors, other than banks, are not permitted to exercise power of sale foreclosure. Even financial institutions, such as insurance companies (corporations), are not included among the categories of creditors allowed to exercise power of sale foreclosure. The exclusions of the insurance companies is tantamount to defeating one of the very rationales of the laws of power of sale foreclosure clearly provided by the preambles of the laws themselves. The alleged rational is to protect the funds of the public deposited with banks and extended to borrowers by banks by virtue of their lending functions.

Here, it should be noted that insurance companies own and administer the funds of the public and do also grant credits by way of issuing several types of policies to insured's on credit basis to insure risks which they think are profitable. At this juncture, it is worth mentioning that at the debate held on the draft of Proclamations No 97/998 and No 98/1998, some insurers in this country firmly argued before the house of peoples' representatives, to make the proclamations include insurance companies in the exercise of power of sale, [31] though the proclamations, ultimately, empowered only banks to foreclose properties held with banks to secure the repayment of a loan.

Such attempt of limiting the exercise of power of sale to banks only, no doubt, has made the scope of the said laws very narrow. In India, despite the fact that the power of sale is granted

to banks and other financial institutions, many still argue that it must empower all types of creditors who have secured mortgaged or pledged properties.[32] In the United States of America and in the United Kingdom, though there are some exceptions, power of sale is not at all confined to banks.[33]

When viewed from security perspective, as the above cited provisions of the proclamations have abundantly made clear, even banks, which are said to be empowered to exercise power of sale, can only exercise the said power over properties mortgaged or pledged with them to secure the due repayment of the loan that they have extended to borrowers. Unless borrowers mortgage or pledge their specific property for the due repayment of a loan that they borrowed, from the banks themselves, banks may not exercise their power of sale over the properties of debtors even when the said debtors owe debts to the banks. Banks may not also exercise their power of sale over the property of a third party who has undertaken a personal guarantee for the due repayment of a loan that other persons have borrowed from banks. Likewise, where banks themselves stand behind their customers to pay off customers' debts where those customers are unable to pay, such as by issuing letter of credit, banks cannot foreclose the properties of these customers even where these customers have mortgaged or pledged their properties with banks.

It is important to, carefully, notice the scope of the recent laws of power of sale foreclosure from time perspective too. As per the wordings of article 3 of Proclamation No 97/1998 and art. 13 of Proclamation No 98/1998, the laws of power of sale foreclosure shall apply to mortgage or pledge agreements that are made between a lending bank and a borrower after the coming into force of the laws of power of sale foreclosure. In other words, the agreement that empower the lending bank to sell the property mortgaged or pledged without the intervention of courts should be made subsequent to the coming into force of the laws of power

of sale foreclosure. In this sense, one can say that power of sale derives its validity from the will of the parties to a contract and the laws of power of sale are forward looking with no retrospective effect.

It should however be noted that the above assertion will not go far in view of the provisions of article 4 of Proclamation No 1998 and article 14 of Proclamation No 98/1998. It is because both articles empower the lending bank to exercise a power of sale foreclosure without being so empowered by the will of the borrower and/or the mortgager or the pledger.

And, hence, the laws of power of sale foreclosure have retrospective validity for the simple reason that the lending bank has secured the properties of the borrowers or persons other than the debtor as a collateral. In this regard, the scope of the laws of power of sale foreclosure, in terms of time perspective, covers all the periods prior to the coming into force of the said laws of power of sale foreclosure, the only limit being the absence or non-existence of a mortgage or pledge agreement made between the debtor and the lending bank or the period of limitation of the claims of the banks incase where property is mortgaged.

One may, however, ask about what will happen where a lending bank that enters into a mortgage or pledge agreement after the coming into force of the laws of power of sale foreclosure fails to obtain and include the consent of the mortgager or pledger that enables it to exercise power of sale foreclosure. Should such a lending bank be permitted to invoke the articles under consideration? Certainly no. This is because, the said articles are only unduly provided to cover the situation prior to the coming into force of the proclamation. After the proclamation, if the power of sale of the lending bank is not available in the mortgage or pledge agreement, it should be presumed that the borrower was not willing to empower the lending bank to exercise power of sale and as if the lending bank has favored other modes of security enforcement where the borrower defaults.

1.4. The nature of the laws of power of sale foreclosure

1.4.1. The laws are discriminatory

As it has been discussed earlier, it is only a lending bank that is empowered by the recently proclaimed laws of power of sale foreclosure to exercise power of sale. In this regard, it can be said that the recently proclaimed laws of power of sale foreclosure in Ethiopia are discriminatory. In spite of the fact that Indian laws of power of sale foreclosure are applicable to banks and financial institutions as secured creditors to enforce their security interest with a view to recovering their debts, they are said to be discriminatory. That is to say, in India it is only banks and financial institutions, where they lend against securities like mortgage of immovable property, charge, hypothecation, etc, that they can sell such securities after giving the required notice to the borrowers so as to adjust the loan, without resorting to litigation in a competent court of law.[34]

It should be noted that, in the matter of recovering their debts, banks in Ethiopia, can, disregarding the provisions of the civil procedure code and other laws that embody matters of civil procedure that refer to the method by which claims of creditors adjudicated and by which rights, privileges and duties are determined and enforced by appropriate legal tribunals, resort to employ the laws of power of sale foreclosure. However, other creditors have to file a law suit in a competent court for the recovery of a loan. To put it otherwise, banks are empowered to short circuit the legal process to enforce the securities for recovery of their loans while other creditors such as individuals, business organizations, not for gain organizations, etc, have to undergo the rigorous court proceedings. This is a clear discrimination endowing one section with legal favoritisms and depriving similarly placed other creditors of such rights.

1.4.2. The laws of power of sale foreclosure and issues of constitutionality and legality

Ethiopia has a written constitution dated July 16, 1931 which provides that an Ethiopian subject may not, against his will, be deprived of his right to be tried by legally established court.[35] Likewise, the revised constitution of 1948 under its article 43 stipulates that no one with in the empire of Ethiopia may be deprived of life, liberty or property without due process of law. Article 40(1) cum article 79(1) of the 1987 constitution of the Federal Democratic Republic of Ethiopia provides that every Ethiopian citizen has the right to dispose of property by sale or bequest or to transfer it otherwise and the judicial power, both at federal and state levels, are vested in the courts.

In view of the stipulations of the above mentioned constitutions of the governments of this country, many persons, mainly lawyers, argue that power of sale foreclosure that does not derive its validity from a contract is unconstitutional. Such argument is common even in countries where the power of sale contained in a mortgage or pledge is a matter of contract that depends on the free will of the creditor and the debtor. Their argument centers around due process of law which requires judicial hearing prior to seizure and sale of property in the possession of the mortgagor or pledger and that the hearing requirement should be applicable whether the items to be seized and sold are necessities or not.[36]

On the other hand, proponents of laws of power of sale foreclosure argue that the underlying theory of power of sale foreclosure is simple. It is that, by complying with the requirements of the law, the mortgagee accomplishes the same purposes achieved by judicial foreclosure without the substantial additional burdens that the judicial foreclosure entails. These purposes are to terminate the interests of the mortgagor by foreclosing the mortgage and to

provide the sale purchaser with a title identical to that of the mortgagor as of the time the mortgage being foreclosed is executed.[37]

In the Ethiopian context, the aforementioned arguments may not sound much because of the fact that power of sale foreclosure in Ethiopia is not only the outcome of contracts. As it has been repeatedly stated, banks in Ethiopia are allowed to exercise power of sale foreclosure even where the mortgagors or pledgers have not given their consent that empowers banks to do so according to the recently issued proclamations or the laws of pledge contained in the civil code.

As it has been repeatedly mentioned in our previous discussions, article 4 of Proclamation No 97/1998 and article 14 of Proclamation No 98/1998, surprisingly allow banks to sell property mortgaged or pledged by public auction and to transfer the ownership to the buyer and when it cannot be sold after two auctions, to themselves, even in the absence of a mortgage or pledge agreement that empower them to do so. These provisions not only go against the will of the mortgagors or pledgers but collide also with the provisions of articles 2851(1) and 3060(1) of the civil code and article 189(2) of the commercial code. This is so because, until the date of the repeal of these provisions, all agreements that are made between creditors and debtors must observe these said provisions. Such agreements should not have been attacked by the laws of the power of sale foreclosure that have a retrospective application.

Citizens who had entered into a mortgage agreement trusting the then laws in force which prohibit creditors to foreclose properties mortgaged must not have been subjected to the provisions of the newly issued laws of power of sale foreclosure. This is because, on the one hand, creditors, until the issuance of the laws of power of foreclosure, were prohibited by the civil code and commercial code to foreclose properties mortgaged to secure the repayment of a loan, on the other hand, debtors were protected by the now replaced laws embodied in the civil

or commercial code from the sale of their mortgaged properties for loan repayments without the order of a court.

In this sense many lawyers are of the conviction that laws of power of sale foreclosure lack legality. Here, the said issue of legality is not raised simply due to the retrospective application of the laws; rather, it is due to the fact that the recent proclamation of power of sale foreclosure attack the mortgage agreements that were made in accordance with the then mandatory provisions of the civil code and the commercial code and that used to enjoy the protection of these same mandatory provisions of the civil code and the commercial code.

1.5. Creation, Duration and Suspension of Power of Sale Foreclosure

1.5.1. Creation of power of sale foreclosure

According to article 3 of Proclamation No 97/1998 and article 13 of Proclamation No 98/1998, power of sale foreclosure can be created by the agreement of the lending bank and the borrower, if the borrower alone can produce the property to be mortgaged or pledged. Where the borrower does not have sufficient property to be mortgaged or pledged, third parties can furnish either immovable property as per the wordings of article 3045 of the civil code or pledge movable property pursuant to article 2826 of the civil code or mortgage a business in accordance with article 177 of the commercial code.

The agreement that creates power of sale foreclosure is a mortgage or a pledge agreement in the wordings of article 3 of Proclamation No 97/1998 and article 13 of Proclamation No 98/1998. The mortgage or pledge agreement is usually made as part and parcel of a loan agreement and the contract that creates power of sale foreclosure is entitled as "loan and mortgage agreement" or "loan and pledge agreement". The said loan and mortgage or pledge agreement can also be placed into two separate parts; the first part may deal with the loan agreement where as the second part may contain mortgage or pledge agreement. There may be

instances where the debtor offers both immovable and movable property to secure a debt. In such cases, the security agreement should include both mortgage and pledge agreement.

The contract that creates mortgage of immovable property such as mortgage of real estate or any building should be crafted in accordance with the provisions of articles 3045 and ff of the civil code, where as the contract of business mortgage should be prepared as per the provisions of article 177 and ff of the commercial code. The contract of pledge should also be made observing the provisions of article 2825 and ff of the civil code.

Usually the security agreement that creates power of sale foreclosure is signed by and between the lending bank and the borrower and/or the third party who furnishes security at the time the loan and security agreement is made. Such kind of arrangement has become the practice of banks after the issuance of Proclamation No 97/1998 and Proclamation No 98/1998. Many banks have already prepared standard loan and security agreements that include power of sale foreclosure. In state owned banks, no borrower may be allowed to sign loan and security agreement that does not include power of sale foreclosure since such an agreement is not subject to negotiation.[38] One can, therefore, say that it is a kind of adhesive contract which a borrower may take or leave it in spite of the fact that the recent laws of power of sale foreclosure seem permissive.

There are situations where lending banks, after the loan has already been released, oblige borrowers to sign a rescheduling loan agreement or additional loan agreement where borrowers request banks additional loan or for rescheduling of loan repayment period thereby capitalizing interest in arrears. As the capitalization of interest in arrears or the additional loan requires additional security, banks do oblige borrowers to sign additional loan agreements or rescheduling loan agreements that include power of sale foreclosure. By so doing, banks do usually try to

update those loan agreements that were made prior to the issuance of laws of power of sale foreclosure and that did not include power of sale foreclosure.[39]

Power of sale foreclosure, in the Ethiopian legal system, is not created only by a contract but also due to the operation of the law. As it has been thoroughly discussed in the preceding sections of this chapter, by virtue of article 4 of Proclamation No 97/1998 and article 14 of Proclamation No 98/1998, banks are being empowered to exercise power of sale foreclosure over property mortgaged prior to the recently issued laws of power of sale foreclosure in the legal systems that prohibit creditors to exercise power of sale foreclosure over mortgage. Pledgees are also permitted to exercise power of sale over a pledge after the borrower has defaulted in accordance with the rules contained in the civil code. This was made possible, not because mortgagors or pledgers have consented for the exercise of power of sale but only due to the operation of the law.

1.5.2. Duration of power of sale foreclosure

The duration of power of sale foreclosure, with regard to properties mortgaged, seems tied up with the duration of mortgage agreement. Recall that there are two types of mortgage, namely, mortgage of business that has to be made according to the commercial code and mortgage of immovable property that should be made as per the relevant provisions of the civil code. A mortgage of immovable property shall not produce any effect except from the day when it is entered in the registers of immovable properties at the place where the immovable mortgaged is situate. [40] It should be noted that the registration of a mortgage of immovable property shall be effective for ten years from the day when the entry was made.[41] After the expiry of the ten years period which is taken to be the life span of mortgage of immovable, the effect of the mortgage will come to an end unless renewed. It is only if renewed and a new entry is made

prior to the expiry of ten years period that the effect of the registration of immovable mortgage shall continue for an additional ten years period from the day when the new entry was made.[42]

The question one may raise, at this juncture, is that, would the power of sale foreclosure continue to exist where the effect of mortgage of immovable property lapses due to the expiry of the effect of the mortgage? Would the power of sale foreclosure and the mortgage agreement survive where the claim over the money lent is not barred by a period of limitation?

Even though it has been said that a power to sell, contained in a mortgage, continue to exist during the life of the mortgage until it is barred by limitation,[43] when the mortgage is not renewed after it expires and where the mortgage is transferred to a third party, there is no reason that the power of sale foreclosure should subsist so long as the very purpose of the said power of sale is to foreclose the mortgage without the involvement of a court.

The commercial code, under article 177(2), stipulates that mortgage of business shall secure the claim for five years from the date of registration and shall cease to have effect, where not renewed before the expiry of five years.

Note that the business mortgage should be registered during the month within which the mortgage deed was drawn up. Therefore, where the business is sold after the expiry of the effect of the business mortgage, the power of sale foreclosure contained in the mortgage deed shall expire owing to the expiry of the effect of business mortgage. This does not, however, mean that the claim of the banks have to be extinguished. In so far as their principal claim is not barred by period of limitation stipulated under article 1845 of the civil code, they can claim the repayment of their loan as any other ordinary creditors.

As to the payment of interest computed on the principal loan amount, banks should, of course, observe the presumption of payments after two years which is provided for by article 2024 (f) and article 3077 (2) of the civil code that may possibly be invoked by debtors.

After the lapse of such time, the appellant brought a petition before the High Court for the execution of the said decision, that is, for the judicial sale of the mortgage.

The respondent, in her preliminary objection, invoked article 384 of the civil procedure code and art. 1845 of the civil code that stipulate period of limitation.

Although the appellant submitted a broad argument on the basis of article 1850 of the civil code, the Supreme Court on Yekatit 18, 1981 E.C under the above mentioned civil case file confirmed the decision of the High Court, saying that article 1850 is applicable to pledge and not to mortgage.

It should be noted that pledge is governed by a special contract. Article 2825, found under book 4, title 12, chapter 6 defines a contract of pledge as "a contract whereby a debtor undertakes to deliver a thing called the pledge, to his creditor as security for the performance of an obligation". A pledge that may consist of a chattel, a totality of effects, a claim or another right to movable property,[45] shall always remain with creditors[46] unless possessed by agreed third party[47] or the creditor is in the possession of the document of title without which the pledge cannot be disposed of .[48]

As it is evident from the provisions of the aforementioned articles of the civil code, the pledge should, unless the law provides otherwise, always remain in the possession of the creditor and in all other cases the contract of pledge shall be of no effect where it stipulates that the pledge shall remain with the debtor.[49] One can, therefore, boldly conclude that the Amharic version of article 1850 is only applicable to pledge since it clearly provides that the creditor should possess the property pledged.

The presumption under art. 2830(1) of the civil code that stipulates "the creditor shall be deemed to be in posession of the pledge where the documents of title, without which the pledge cannot be disposed of, have been delivered to him" does, in no way, enable us include real estate

mortgage or business mortgage even where the contract of these mortgages require the delivery of title deeds. This is because, a mortgage of whatever type can be transferred independently of its title deed as can easily be understood from the provisions of articles 3084 and 3085 of the civil code and articles 187 and 190 of the commercial code. Whereas, in the wordings of article 2830 (1) of the civil code, in the absence of the said title deed of pledge, a pledge cannot be disposed of. On top of these, sub articles 1 and 2 of article 2830 make the matter very clear where they stipulate that the creditor shall be deemed to be in posession of the pledge where the document of title, such as voucher for goods warehoused, bill of lading, way-bill in the case of goods in transport, or instruments embodying a money obligation have been endorsed in his favour. The delivery only of such documents of title to goods or a money obligation to the creditor, does not imply that the debtor is in posession of the goods or the rights embodied in the documents. It, rather, implies clearly, otherwise and that the pledge, whose document of title to goods or a money obligation is endorsed, is in the posession of a third party or the pledgee. Above all, it should also be noted that some of such kind of pledges whose documents of title to goods have been delivered, do not stay for a longer period, say for a year or above, since their current price would definitely fall owing to obsolescence or their perishable nature, and incase where instruments embodying a money obligations are pledged to the creditor due to their date of maturity they have to immediately be sold after a protest.

For all these reasons, the writer of this thesis is of the opinion that article 2850 is only applicable to pledge.

Be this as it may, let us now turn back to consider whether the duration of power of sale foreclosure, embodied in a pledge agreement, is limited owing to the lifetime of the effect of a pledge. With regard to contract of pledge, the civil code no where provides for a duration beyond the time of which the contract of pledge stops to have effect. One can, therefore, safely conclude

Banks, prior to sale, should give notice and also advertise the sale of the mortgage. This process takes quite some time and gives the mortgagor a chance to alienate properties that are not pledged or mortgaged but that could be attached in order it cover the would be deficiency judgement in case where the value of the security held may not cover the principal loan, interest and other charges and expenses.

To combat such practices of debtors, banks, after they give notice of intention to foreclose to the debtors, file lawsuits with the view to obtaining injunction order over the property not held as security. Debtors who receive such notice submit their objection to the court when they are ordered to submit their statement of defense attaching the notice as an evidence. In such cases, the court suspends the power of sale foreclosure.

In a civil case, DBE V. Ato Kifle Fentamo, the plaintiff, DBE, sued the defendant, Ato Kifle Fentamo, before the Hadiya Zone High court of the Southern Peoples' National Regional Government to recover birr 285,000.00 which it has loaned to the defendant. The plaintiff has also given a 30 days prior notice of intention to foreclose to the defendant. The defendant, along with his statement of defense, submitted a petition for an injunction order over the plaintiff's power of sale foreclosure, alleging that the plaintiff should not be permitted to exercise power of sale and file a law suit at the same time. The High Court, on 21 July 2001 under civil case file No 23/93, gave an injunction order stating that banks cannot employ two methods of security enforcement simultaneously and may not also terminate law suit filed after the coming into force of the laws of power of sale foreclosure. The decision of the court is in conformity with the generally prevailing doctrine in power of sale foreclosure countries which says that a power of sale contained in a mortgage is not to be exercised during the pendency of a law suit by the mortgagee to foreclose.[50]

CHAPTER TWO

PREREQUISITES TO DETERMINING POWER OF SALE AS A MODE OF SECURITY ENFORCEMENT AND CONDITION FOR THE EXERCISE OF POWER OF SALE

2.1. Prerequisites

Among several modes of security enforcement, in order to determine that power of sale foreclosure is proper, lending banks have to make sure that prerequisites for the exercise of power of sale have properly been met. These prerequisites are the foundation for the exercise of the power of sale foreclosure and in their absence the exercise of valid power of sale is unthinkable.

2.1.1. Valid and registered contract of mortgage or valid contract of pledge and posession of pledge

2.1.1.1. Valid contract of mortgage

As it has already been mentioned, two types of mortgages exist in the Ethiopian legal system, namely: mortgage of immovable property and mortgage of business. The laws of power of sale foreclosure, so far considered at length, nowhere mention how these mortgage agreements should be crafted, even though they stipulate that these mortgages can be created as a result of a contract.

Thus, it is imperative to resort to the relevant provisions of the civil code and the commercial code that govern mortgage of immovable and mortgage of business respectively.

Note also that the mortgage agreement that banks do enter into with the mortgagors should observe the provision of article 1678 and the following of the civil code found in " contracts in general" and that provides that "parties to a contract should be capable of contracting

and give their consent sustainable at law, that the object of the contract be sufficiently defined and that the contract be made in the form prescribed by law, if any." This is because "contracts in general" applies to special and commercial contracts in so far as they do not conflict with special provisions on them.[1]

2.1.1.1.a. Valid and registered contract of mortgage of immovable

To begin with, though land and buildings are said to be immovable properties,[2] that cannot move by themselves or that cannot be moved within the meaning of article 3047(1) of the civil code, since all land in Ethiopia is now owned by the state and is alleged to be inalienable,[3] it is only over buildings that mortgage of immovable can be created in the present day political, economic and legal system of Ethiopia. Thus, banks, since the nationalization of land in this country, do not mortgage land except buildings erected on the land which is owned by the state.

1. In order there be a valid mortgage of an immovable; banks should enter into mortgage agreements with a debtor who is entitled to dispose of his immovable for consideration.[4] Where a person, other than the debtor, is willing to secure the debt of the borrower by furnishing a mortgage, banks have to make sure that the said person is entitled to dispose of the immovable gratuitously.[5] This is because, a mortgage can be of no effect where it is created by a person, be it natural or artificial, who is not entitled to dispose of the immovable, even where he/it subsequently acquires the right to dispose of the immovable.[6]

The plaintiff, Jeka Area Housing Cooperative sued the first defendant, Ato Tigistu Beza and the second defendant, CBE, before the Federal First Instance Court Seeking the invalidation of the mortgage agreement made between the first and the second defendant. The first defendant, who is a member of the plaintiff (the housing cooperative) mortgaged one of the dwelling houses registered under the title deed issued to the plaintiff in favour of the second defendant to secure a

loan advanced to a private limited company incorporated in Ethiopia. The house mortgaged in the first degree had no separate title deed issued to the mortgagor, the first defendant, except the one given in the name of the plaintiff that evidences the plot of land deemed sufficient to construct dwelling houses for the members of the plaintiffs whose number was twelve (12).

The second defendant contended that the house mortgaged was registered by the Addis Ababa City Administration Municipality empowered to register mortgage agreements without any objection and hence the mortgage agreement is valid. CBB which held the entire houses of the plaintiff for the loan it extended for the construction of the houses of the plaintiff intervened and prayed for the invalidation of the mortgage agreement made between the first and the second defendants. In civil case, file No 00433 on October 27, 2003, the court decided that the mortgage agreement be invalidated on the ground that proclamation No 147/90, article 30 and 32 prohibit the sale or mortgage of dwelling houses owned by the cooperative prior to the entire settlement of the loan advanced to the cooperative and that a separate title deed is issued to each and every member of the cooperative.

It is interesting to notice the expensive mistake that the second defendant has committed when it held the said house in first degree mortgage. The second defendant did not even bother itself to obtain the consent of the plaintiff and CBB that held all the houses of the cooperative in first degree mortgage. The registrar's mistake seems deliberate and hard to swallow since it has registered the mortgage agreement made between the second defendant and the first defendant while knowing the first degree mortgage that CBB had already caused to be registered before itself. The argument that CBB has made before the court is also astonishing in view of the fact that the second defendant's claim could have been treated as a junior claim.

Lack of precaution on the part of a lending bank at the time of mortgage agreement could result in a severe consequence that goes to the extent of the cancellation of the mortgage.

In a civil appeal, file No 18040, the appellant, NIB Bank (S.C), took an appeal from the order of the Federal High Court that was given in execution file No 27527 in favour of the respondent, Ato Endashaw Robele. The respondent, the judgement creditor before the High Court, has obtained an order from the court for the judicial sale of the judgement debtor's, W/o Bizunesh Endale's property situated in Addis Ababa, woreda 8, kebele 14, house No 192. The now respondent argued before the High Court that it has mortgaged the house and caused the registration of same by the concerned government organ and prayed that it be paid birr 982,858.43 out of the proceeds of the judicial sale in priority to the judgement creditor. The judgement creditor contended that the bank has only mortgaged the house in part since the judgement debtor, W/o Bahirnesh Robele has signed the mortgage agreement on the blank space provided in front of the name of the owner of the house, Ato Endale Ruga, but on behalf of her children who are heirs of their deceased father, Ato Endale Ruga, and that she did not sign the mortgage agreement in her own name and capacity as the wife of the deceased in whose name the title deed still exists.

In addition, the judgement creditor argued before the court that the bank entered in to the mortgage agreement after the house has been attached by the order of the court before which the CBB is now litigating. The High Court rejected the arguments of CBB, the respondent before the Supreme Court, on the ground that the judgement debtor's share over the house has not been mortgaged with the bank since the judgement debtor has not signed the mortgage agreement in her own name but on behalf of her children, the principals.

The Federal Supreme Court confirmed the order of the High Court stating that the judgement debtor did not mortgage her share over the house so that it is not necessary to verify whether or not the mortgage agreement that CBB has entered in to was registered prior to the judicial attachment.

I could not understand from where the courts learnt that the judgement debtor, the wife of the deceased, is entitled to half of the property mortgaged. The fact that the judgement debtor has been stated in a verdict of a court as the wife of the deceased in whose name the title deed has been issued alone cannot be a conclusive evidence that she is entitled to half of the value of the mortgage. To put it otherwise, the fact that she signed on behalf of her children, the heirs of the deceased, does not confirm that the house does not entirely belong to the heirs. What if the house had entirely been owned by the deceased due to the fact that it has been constructed or purchased by the deceased prior to his marriage or the deceased acquired the house within the life span of his marriage owing to donation or will expressly made to him?

The reasoning of the High Court that the mortgage agreement was made prior to the judicial attachment, with due respect, is erroneous since it is based on an evidence that has never been adduced. This is because the court saw the date of judicial attachment and the date of contractual mortgage but it did not examine the date of registration of the mortgage. Had the judicial attachment been registered, the judgement creditor would have adduced the necessary evidence in view of the fierce litigation confronted with.

Let us compare the above mentioned decision of the Federal Supreme Court with the under mentioned decision of the same court.

The plaintiffs 1) Ato Tesfahun Denboba and 2) W/o Zenebech Urje sued the defendant, CBE, before the Federal High Court, alleging that it is only the first plaintiff who signed the mortgage agreement with the defendant due to the fraudulent act of the branch managers of the defendant and the borrower, Mengistu Worku. The official of the defendant and the borrower have misled the first plaintiff on the date he has signed the agreement saying that if his wife will not agree to sign the mortgage agreement tomorrow morning, his signature will be cancelled and the title deed will be returned to him. In the next morning when the first plaintiff told the

officials of the defendant that his wife refused to consent and that his signature be cancelled and his title deed be returned, they told him that they will do so, as soon as the borrower substitutes another collateral.

A week later, from the date the plaintiff signed the mortgage agreement, the borrower requested the branch manager of the defendant in writing to release him the loan amounting to birr 600,000.00 quickly since the wife of the first plaintiff will sign the loan agreement as soon as she returns from USA. The branch manager forthwith, released the loan to the borrower expressly stating on the written application of the borrower "waive the signature of the wife and release the loan quickly". Though the first plaintiff appealed repeatedly to senior official of the defendant in order his title deed be returned and although the defendant assured him that his signature has been cancelled and promised that it will return the title deed to him, it failed to return the said title deed. And when the defendant advertised the public sale of the said house, the plaintiffs brought the suit in order the mortgage agreement be canceled and their title deed be returned to them.

The defendant contended that since the first plaintiff, in whose name the title deed has been issued, has mortgaged his house, his wife's signature is not necessary for the validity of the mortgage even where her name appears in the mortgage agreement in the wordings of article 1995 of the civil code. The defendant further contended that since the first plaintiff has paid birr 2500000.00 after the notice of public sale of his house and has signed an agreement to settle the balance, such acts of his demonstrate his commitment to settle the loan and that he is the sole owner of the house.

The High Court, on Meskerem 26, 1996 E.C, in file No. 11780, held that the title deed and birr 250000.00 that the first plaintiff has paid to the defendant be returned to the plaintiff

since there is no valid mortgage agreement in the absence of the consent of the wife, the second plaintiff.

The Supreme Court entirely reversed the decision of the High Court on Sene 24, 1996 in file No 14046 on the ground that the second plaintiff, the now second respondent, would have sued her husband together with the defendant, the now appellant, had she been cheated by her husband and had the house been mortgaged without her knowledge.

The decision given by the Supreme Court in the case of NIB V. Ato Endashaw Robel and now in the case of CBE V. Ato Tesfahun Denboba and W/o Zenebech Urje contradict with each other. If the signature of a wife is necessary to mortgage her share over the house, the title deed of which is in her husband's name, the consent of the husband alone would only mortgage his share over his house. Failure on the part of a wife to sue her husband together with the defendant bank can, in no way, be a conclusive evidence for her to consent to the mortgage agreement and deprive of her right to file a law suit for the cancellation of the mortgage agreement her husband has alone signed in the wordings of article 69 of the revised family code.

2. A contract of mortgage of an immovable should be in writing in the wordings of article 3045(1) of the civil code. Non-compliance with this provision usually results in nullity of the contract as per the provision of this same article 3045(1). Here, written form is not required for the purpose of proof but for the very existence of the contract of mortgage itself. In this regard, no bank has so far faced problems since all contracts of mortgage that banks enter into with mortgagors are in writing. No bank even had extended a loan without signing a written agreement even though the civil code of Ethiopia, under article 2473, permits banks to prove their loan by a testimony of a witness or presumption.

At this juncture, it is worth noting that the decision of a court rendered with regard to issues involving absence of the signature of a witness on a loan and mortgage agreement.

The plaintiff, Eyob Alemayehu, filed a law suit against the defendant, CBE, before the Federal First Instance Court, alleging that the loan and mortgage agreement which has not been attested by a witness be invalidated. The defendant contended that the absence of the signature of witnesses should not be taken as a formal requirement or a condition precedent for the validity of a loan and mortgage agreement; moreover, argued that the plaintiff should not be permitted to invoke absence of signature of witnesses after five years have lapsed from the date of the loan and mortgage agreement and after the plaintiff has withdrawn birr 1,403,020.50 (one million four hundred three thousand twenty birr and fifty cents) and the loan amount together with interest in arrears has amounted to birr 1,820,000.00. The court decided that the agreement be invalidated since it is not made in accordance with article 1727(2) of the civil code.

The purpose of having an agreement attested by witnesses seems to protect debtors who may be obliged to sign a contract against their will or who do not read, write and understand the contract they sign. The need for peculiar requirement of attestation by witnesses which is intended to make up for the lack of public facilities and of familiarity with them in many areas of Ethiopia[7] should not be taken as a condition precedent for the validity of a loan and/or mortgage agreement. On top of this, as the under-mentioned decision of the Supreme Court has made it clear, loan agreements that involve above 500 birr, though required to be in writing, need not necessarily be attested by a witness.

In a civil appeal, Tamirat Tekle Haimanot V George Velesario, Tamirat Tekle Haimanot, the appellant, took an appeal from the decision of the High Court that set the respondent, George Vebesario, free from liability. The respondent had borrowed birr 65000.00 (sixty five thousand birr) from the appellant signing a loan agreement that has not been attested by a witness. As the

respondent was unable to settle his debt, the appellant, the plaintiff at the trial High Court, sued the respondent, the defendant at the trial High Court, seeking the repayment of the loan. The defendant could not appear before the court as he was outside Ethiopia due to the then political situation prevailing in the country, the case was tried in his absence. The High Court held that the defendant should not be responsible for the repayment of the debt on the ground that the loan agreement has not been attested by witnesses.

The Supreme Court, in civil appeal file No 490/72 on March 3, 1985, reversed the verdict of the High Court on the following grounds: 1) that the defendant did not deny the loan agreement as he has clearly stated in his letter addressed to his country's embassy to Ethiopia that his debt should not be paid since the government of Ethiopia has nationalized all his property in Ethiopia; 2) that the loan agreement made between the appellant and the respondent need not require to be attested by witnesses for its validity. Article 2472(1) of the civil code, that provides "where the sum lent exceeds five hundred birr, the contract of loan may only be proved in writing or by a confession made or oath taken in court", only tells us that the written agreement is required to prove a contract not as a "form" of contract; and 3) that, although the loan agreement has not been attested by witnesses, this does not reduce its validity of proving a debt.

The reasoning of the Supreme Court seems sound because of the fact that article 2472(1) of the civil code, which is the relevant and specific article to the case at hand, does not stipulate that a loan agreement be attested by a witness. Likewise, article 3045 does not require the attestation of a mortgage agreement by a witness.

In light of the before-mentioned decision of the Supreme Court and where the debtor himself did not deny the loan that he took from the lender and the specific articles on loan of money and mortgage found in the "special contracts", do not require the attestation of a witness,

holding that a loan and mortgage agreement that does not bear the signature of witnesses be invalidated is, with due respect, wrong.

3. The mortgage agreement that banks enter into should clearly specify the immovable mortgaged.[8] The agreement has to specify, in particular, the commune in which the immovable is situated, the nature of the immovable and , where appropriate, the number of the immovable in the cadastral survey plan, unless the immovable is situated in an area where there is no cadastral plan in which case not less than two of its boundaries must be specified.[9]

In this regard, the practice of banks, in most instances, is in line with the requirement of the law. Banks invariably, in their mortgage agreements of immovable, state the title deed number, the administrative region, district (Woreda), kebele in which the immovable is situated and house number, if any.

There are also instances where banks do state, in their mortgage agreement, two kinds of title deed for one and the same building, vis, the old title deed issued prior to the nationalization of extra houses and the title deed issued in the form of booklet for houses that were not nationalized. This is to prevent persons who attempt to mortgage nationalized houses since the then government took only the house without dispossessing the title deed that evidences the ownership. The ownership title in the form of a booklet may not alone enable the owner to mortgage the house since it does not state the area of the plot of land on which the mortgaged house is erected.

Where banks mortgage houses constructed under the umbrella of a housing cooperative, they do obtain not only the consent of the member who has a seemingly possessory right but also the consent of the housing cooperative in whose name the title deed is issued. The consent of the cooperative is said to be obtained where the general assembly, the supreme organ of the cooperative, as per its article of association, passes a resolution so as the house be mortgaged.

Where the cooperative has taken a loan from banks, usually from the CBB, for the construction of the houses, the banks which are desirous to hold the member's house on second degree mortgage, should obtain the consent of the bank which enjoys first degree mortgage. Where, therefore, a house constructed under the umbrella of a housing cooperative is mortgaged, the agreement states not only the title deed issued in the name of the cooperative and the area where the house is situated but also the boundaries of that specific house allotted to the individual who is willing to mortgage the house allotted to him.

4. The mortgage agreement that lending banks enter into with their borrowers must specify, in Ethiopian currency, the amount of the claim secured by the mortgage in the wordings of article 3049(2) of the civil code. Failing to observe the provision of this article makes the mortgage of no effect as it is clearly provided in the said article. Banks, in their mortgage agreement, do not only state the amount of capital lent for which the property is mortgaged. As it would be difficult for banks to state the exact amount of money that the borrower should repay, they do mention the principal amount that is extended to the borrower and, in addition to this, state the interest that would be computed, on the principal amount as per the loan agreement and also other charges and costs that the banks would incur in connection to the loan.

With regard to currency, the mortgage agreements that banks enter into, specify the loan amount in Ethiopian currency, even in cases where the proceeds of the loan is to be paid for supplier of goods and services in foreign country in foreign currency.

5) Although a mortgage may be created to secure any claim whatsoever, whether existing, future, conditional or contingent, the mortgage agreement should not relate to future immovables,[10] failing which it shall be of no effect in the wordings of article 3050(3) of the civil code.

The mortgage that banks usually hold is an existing immovable. It should, however, be noted that banks that provide investment finance hold buildings that would be constructed by the

borrower's own contribution and the loan which would be disbursed in several phases. This is the very purpose of a long term real estate funding by which the said real estate is to be constructed.

In connection to this, one may question that, would the building that would be constructed by the loan be considered as a future mortgage?

The specialized banks in Ethiopia, the DBE and the CBB which provide long term loans for construction of real estate, to escape the sanction of article 3050(3) of the civil code, state in their mortgage agreement as if the "would be erected" building is an existing one.[11] Such a practice negates the reality on the ground and the writer of this thesis is of the opinion that the mortgage agreement should always state the truth and only the truth in order banks be protected from adverse consequences of their practices.

It should be noted that the provision of article 3050(3) should not be interpreted so as to make the mortgage agreement that relate to houses in the process of construction of no effect in so far as the loan is to be utilized for construction of the mortgaged unfinished houses. In the United Kingdom, clearing banks and, to a lesser degree, merchant banks provide loans for property development. Generally, the loans have been secured on collateral beyond the property to be developed. Non- recourse finance which can be defined as loans on property unsupported by outside collateral is now more popular. [12]

Houses whose construction is not fully completed should not be taken as future immovable. The purpose of the article under consideration does not seem to include such kinds of constructions. It, rather, seems to refer to a building the construction of which has not yet started or a building that does not exist at the time of the mortgage agreement. As it would be difficult to value such buildings for the purpose of mortgage, the applicability of article 3050(3) to such circumstances seems sound. So, mortgaging such future immovable can only be taken as

The mortgagee bank shall have the same right where the value of the immovable is intentionally or negligently reduced or endangered by a third party who acquired the immovable from the mortgagor in the wordings of articles 3074 and 3107(2) of the civil code. However, the mortgagee bank may not demand new securities nor that part of the debt be discharged where the actual or possible reduction in the value of the immovable mortgaged is due to causes other than alienation or deterioration by the mortgagor or by the act of a third party. [18]

6. Mortgagee banks must make sure that at the time of the mortgage agreement the mortgage is free from prior encumbrances or that the encumbrances will not affect the loan to be secured due to insufficient value of the mortgage as a result of prior mortgage to other creditors. As a mortgage may also result from the law or a judgement[19] banks must do their level best to ascertain whether the immovable they intend to mortgage has not already been subject to judicial or legal mortgage. So also, banks should also make sure that whether there exists a prior contractual mortgage over the property they intend to mortgage prior to the signing of the loan and mortgage agreement and, if any, compute the balance of the value of the mortgage in order to ascertain that it is sufficient to secure their principal loan amount, interest, costs and expenses that they would incur in connection to the loan.

This is not without reason. It is where banks are willing to forgo their power of sale that they should hold secondary mortgage. The first degree mortgage beneficiary creditor may not permit banks that do enjoy secondary mortgage to exercise power of sale foreclosure and reimburse his credit out of the proceeds of the sale of the mortgage because of several reasons. Firstly, unless the mortgagor agrees, banks have no mandate to pay such creditors out of the proceeds of the sale of the mortgage. After collecting what is due to them, banks are duty bound to pay the surplus to the mortgagor himself. The mortgagor who is paid in such manner may not be willing to pay the creditor and may use it, rather, for his benefits. Secondly, creditors who

have first degree mortgage interest may not be willing to forgo judicial proceedings owing to the fact that the process of judicial sale is deemed to be neutral, dependable and may not give banks an opportunity to play a biased role to themselves. Thirdly, since the lending bank, under judicial sale foreclosure, may not have the right to bid at second auction to purchase the mortgage without the permission of a court as it is envisaged under article 428 cum 430 of the Civil procedure code, the first degree mortgage beneficiary would prefer judicial sale foreclosure. It should be noted that bidding at second auction is a kind of safety device to prevent bidders from purchasing the mortgage for a lower price.

The plaintiff, CBE which advanced birr 100000.00 (one hundred thousand birr), to Ato Fisseha Hailu Wolde Aregawi, the borrower and mortgager, against the dwelling house situated in Assossa town, kebele 06, house No 660, brought a suit against DBE, the defendant, to prevent it from exercising its power of sale foreclosure over the said mortgaged dwelling house. The plaintiff , in its statement of claim that it has filed before the Benishangul Gumuz National Regional State, Asosa High Court, alleged firstly that it has a first degree mortgage over the mortgage and the title deed and site plan which evidences the ownership of the mortgage is in its possession. The statement of claim of the plaintiff states further that the Asosa Municipality, having examined the loan and mortgage agreement, made between the plaintiff and the borrower, has registered the mortgage and confirmed the registration of same by a letter ref. No 4682/342/87 dated Hamle 30, 1987 E.C. (August 6, 1995) addressed to it.

Secondly, the plaintiff alleged that while it endeavors to foreclose the mortgage in accordance with proclamation No 97/1998 upon default of the borrower, has learnt that the defendant has transferred the ownership of the mortgage to itself for the satisfaction of its loan which it extended to the person other than the borrower without obtaining the consent of the plaintiff that had priority of mortgage and prayed that the defendant's ownership right over the

mortgage be cancelled and it be returned to the borrower in order it foreclose the said mortgage for the satisfaction of the loan it has extended.

The defendant contended: 1. that it has mortgaged the same property for the loan it granted to the Selam Leandinet Agricultural Private Limited Company as per the loan and mortgage agreement it entered in to on Miazia 27,1987(E.C) with the mortgagor, Ato Fisseha Hailu Wolde Aregawi; 2. that the said loan and mortgage agreement has been registered by and deposited with the Asosa Municipality; 3. that the Asosa Municipality has confirmed the registration of the mortgage by its letter, ref No 3553/342/87 dated Miazia 8, 1987 E.C ; 4. that it possesses the original title deed of the mortgaged property; and 5. that it has transferred the ownership of the mortgage after having undergone all the process provided for by Proclamation No 97/1998 and prayed that the suit of the plaintiff be rejected and that the court let it go free from any liability.

The court, in civil case file No 579/95 on Tir 13,1996 E.C (January 25, 2004), held that the defendant is not liable at all for the claim of the plaintiff. The reasoning of the court was that, though the plaintiff's right of mortgage over the house is undeniable, the defendant has priority over the mortgage according to article 3081(1) of the civil code that provides "where several creditors have a registered claim on the same immovable, they shall rank according to the date on which they have registered their claim".

The decision of the court and its reasoning is correct in view of the claim of the plaintiff and the argument of the defendant. It should, however, be noted that the facts of the case do not only raise question of priority of mortgage. The facts clearly demonstrate that the mortgagor and the registrar have caused the registration of the plaintiff's right of mortgage, without disclosing to the plaintiff that the mortgage has already been held by the defendant. This clearly shows the existence of a fraud both on the part of the mortgagor and the registrar. The registrar has to be

held responsible for the fault its employees have committed according to the wordings of article 2033 cum 2130 of the civil code. So also, the mortgagor's liability, in such circumstances, should not be limited to the extent of the value of the property he has mortgaged, as envisaged under article 3105 of the civil code.

The before mentioned case exemplifies the consequences where the mortgaged property is not free from prior encumbrances. Some borrowers and/or mortgagors do exploit the funds of the public held by banks by mortgaging one and the same property to several banks in a first degree mortgage in collaboration with the registrar of immovable mortgages. There are also instances where issues of legal mortgage arise in relation to property mortgaged with banks and which hamper the exercise of power of sale foreclosure granted to banks.

The Addis Ababa Zone 2 Finance Office, filed an application before the Addis Ababa First Instance City Court to have a decree executed, had obtained judicial attachment over the property of the defendant, Ato Beyene Tsegaye, which has already been mortgaged to CBB. The CBB, having learnt of the pendency of the execution, intervened as permitted by article 418 of the civil procedure code and requested the court to set aside the injunction order alleging that the court has no jurisdiction over properties mortgaged with banks. The decree holder, the Addis Ababa Zone 2 Finance Office, contended that the bank has no right of priority of mortgage and its petition be rejected. The court ruled out in favour of the decree-holder on the ground that an intervener can not object the competence of the court and that a party who claims priority over mortgages should be entitled to be paid from the proceeds of the judicial sale of the mortgage prior to other creditors. The bank lodged an appeal to the Addis Ababa City Appellate Court and subsequently to Cassation Bench of the same court and both benches rejected its appeal or petition. Finally, the bank took the case before the Federal Supreme Court Cassation bench alleging that the decision of the courts involve fundamental error of law. The Supreme Court, in

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its judgement passed in civil case file No 5034 on Tir 28, 1994 E.C (February 5, 2002) reversed the decisions of the lower courts stating that the decisions of the lower courts contravene the provisions of article 3059(1) of the civil code and article 418 of the civil procedure code and remanded the case ordering the Addis Ababa First Instance City Court to dispose of the case as it thinks fit after hearing the argument of the parties.

With due respect, it is submitted that the decision of the Federal Supreme Court Cassation Bench is a decision that did not resolve the issue before it and is of no help both to the parties and to the lower courts. What is left that the lower courts did not consider in view of the issue before them? The lower courts had clearly held, in their decisions, that the bank has a priority right over the proceeds of the mortgage and that the court shall not set aside the injunction order given over the mortgage since the mortgage should be sold by the order of the court but not by the bank pursuant to the laws of power of sale foreclosure. Despite the fact that the facts before the Federal Supreme Court Cassation Bench were clear, the court did not even frame an issue and the decision it passed is neither in favour of the bank nor against the decision of the lower courts.

It ought to have not been so difficult for the Federal Supreme Court either to confirm the decision of the lower courts or to rule out in favour of the intervening bank by clearly and boldly stating, in its verdict, that the power of sale foreclosure granted to banks cannot be suspended by injunction order given over a property mortgaged with banks even where a junior mortgagee has obtained a decree of a court for judicial sale of a mortgage held by a lending bank.

The writer of this thesis is of the opinion that the before-mentioned decision of the lower courts ought have not been reversed by the Federal Supreme Court. It is because, the power of sale granted to lending banks does not deprive courts of their competence to exercise judicial sale foreclosure over properties mortgaged with banks where the same property is subsequently

subject to judicial, legal or contractual mortgage and where the mortgagor has failed to discharge its obligation towards junior mortgagees. In such situations, the lending bank should only be entitled to be paid in priority to other creditors, who enjoy junior mortgages, out of the proceeds obtained through judicial sale within the meaning of article 3076 of the civil code. Neither the laws of power of sale foreclosure nor provisions of the civil code on mortgage of immovable entitle the lending bank to deprive citizens, who enjoy secondary mortgage, of their rights to take a defaulting borrower before a court of law with the view to obtaining a decree for judicial sale over a property mortgaged with banks. The denial of such rights not only harms the interest of the said mortgagees but also banks themselves and this is because potential mortgagors would be hesitant to mortgage their property to banks since such reaction of banks obstruct subsequent mortgage which is duly recognized by article 3081 and ff of the civil code.

The laws of mortgage embodied in the civil code only mention that the mortgage shall secure the payment to the mortgagee, in priority to other creditors, of the registered amount of claim. Whether the mortgage results from the law or a judgement or be created by a contract or other private agreement does not really matter.[20] Notice that a mortgage, however created, shall not produce any effect except from the day when it is entered in the registers of immovable properties at the place where the immovable mortgaged is situate.[21] Although such clear provision exists in the civil code, many creditors including government organs, where they enjoy a mortgage that result from law or judgement, contend that whether their claim has been registered or not, stands in priority to other creditors even whose mortgage has been registered.

Notice that where several creditors have a registered claim on the same immovable, they shall rank according to the date on which they have registered their claim, regardless of the fact that the date on which the claims become certain or exigible. As opposed to the past undue practice in this country, article 80(1) of income tax proclamation No 286/2000 confirms the

before-mentioned civil code provisions in a rational manner, when it enunciates that "from the date on which tax becomes due and payable under the tax proclamation, subject to the prior secured claims of creditors, the tax authority has a preferential claim over all other claims upon the assets of the person liable to pay the tax until the tax is paid".

The tax proclamation not only respects preferential claim to assets but also stipulates under its article 80(3) and (4) that the claim of the tax authority shall charge the assets of the defaulting tax payer only from the date of registration.

The only type of claim that has priority over registered banker claims or debts without even being registered is the claim of a worker arising from employment relationship.[22]

2.1.1.1.b. Valid and registered contract of mortgage of business

Lending banks can secure their loan by charging a business as clearly envisaged under articles 171(1) and 177 and the following of the commercial code.

In order banks to be able to exercise power of sale foreclosure over a business, they have to enter into a valid contract of mortgage of a business. So also, in order there to be a meaningful contract of mortgage of business, banks have to clearly understand what a business is or what a business constitutes. This is because, it is only where a creditor properly understands elements of a business that he/it can enter into such a meaningful contract of mortgage of a business. A business, according to article 124 of the commercial code, is an incorporeal movable consisting of all movable properties brought together and organized for the purpose of carrying out a commercial activity. Articles 127 and 128 of the commercial code make elements of business further clear, i.e. that a business consists of corporeal elements and incorporeal elements. Article 127 enumerates the incorporeal elements where as article 128 provides for corporeal elements of a business.

Good will, trade name, the special designation under which the trade is carried on, the right to lease the premises in which the trade is carried on, patents or copyrights, such special rights as attached to the business itself and not to the trader are listed under article 127 as incorporeal elements. These elements refer to a legal right in property having no physical existence.[23] Equipment or goods that are part and parcel of a business are corporeal elements in the wordings of article 128 of the commercial code. Unlike the incorporeal elements, corporeal rights have a physical and material existence and are tangible.[24]

It should be noted that, though a business may consist of the before-mentioned incorporeal and corporal elements, it does not consist of the premises (building or part of a building) where the business is carried on. So also, a business shall normally not include the assets and debts of the trader with the exception of the right to the lease of the premises.[25]

Although a business shall normally not include the assets and debts of the trader, where the mortgagor employer assigns his business, the contract of employment made between the mortgagor employer and the employee shall continue between the employees and the assignee of the business.[26] Likewise, during five years from the sale, the seller shall refrain from any act of competition likely to injure the buyer and he may not carryon, in the vicinity of the business he sold, a trade, similar to the trade carried on by the buyer, shall be deemed to be an element of a business and may be enforced by the buyer and his heirs and by any subsequent buyer.[27]

So also, notwithstanding any provision to the contrary, the insurance policy shall continue with the assignee where the business insured is assigned, unless and until the assignee and the insurer terminate the policy within three months from the date of the assignment.[28]

Leaving this aside for the moment, but having in mind the before-mentioned discussion, let us consider how a valid contract of business of a mortgage should be prepared here below.

1. To begin with, it is a person who is capable under the civil law[29] and who owns a business and has been registered and given business license that may mortgage such business notwithstanding that he does not operate it himself.[30] Here, note that the owner of a business need not operate the business. However, it is a trader who can mortgage a business that he operates.

2. The contract of mortgage of a business must be in writing.[31] Even though article 177(2) provides, in a mandatory fashion, that a contract of mortgage of business shall be in writing, it does not provide any sanction where parties to a contract of business mortgage fail to observe this mandatory provision. As repeatedly stated earlier, provisions on contracts in general apply to special or commercial contracts where the laws in the special contracts or the commercial code fail to provide rules governing a given contract and where provisions on contracts in general do not conflict with the rules in the special contracts or the commercial code. Therefore, the provision of article 1720(1) of the civil code, that provides "where a special form is prescribed by law and not observed, there shall be no contract but a mere draft of a contract", supplies a sanction for the provision of article 177(2) of the commercial code.

The contract of mortgage of a business need not charge all elements of a business unless expressly specified in the contract of a business mortgage.[32] Hence, a lending bank that is desirous to charge the entire element of a business must expressly specify those incorporeal and corporeal elements of a business stated under article 127, 128 and ff of the commercial code. As good will does not necessarily exist in a business where, for instance, the business had a bad reputation, an inefficient labor force or other negative factors or it is completely new, lending banks must make sure that the business has a good will when they mortgage an ongoing business. Failing to mortgage a business that has a good will is no more than mortgaging some equipment that depreciate from time to time until the loan amortizes completely.[33]

3. The lending banks not only have to enter into a valid loan and contract of mortgage of a business, but should cause the registration of the contract by the competent government organ.[34] The request for registration of mortgage of business shall be submitted to Regional or City Bureau of Commerce and Industry or a Regional or City Authority entrusted with the power to register mortgage of business by filling in two copies the application forms for registration prepared by the bureau as per the wordings of article 5(2) cum article 2 of proclamation No 98/1998. The said applicant shall attach the contract of mortgage of business or other evidence which is said to be the basis for the request of registration[35] to the application form prepared by the bureau and where in a) the name and the address of the applicant or agent requesting for registration, b) if the business has been mortgaged previously, the registry number and date of registry, c) whether the mortgage emanates from the law or contract, d) whether the application for registration is for making new registration or amending the existing registration, e) the day, month and year of the filling of the application form.[36] Lending banks must make sure that the entry of the mortgage in the registrar show: a) the names and address (of the lending bank); b) the date and the nature of the mortgage agreement (deed); c) the claim secured by mortgage, the conditions on which it may become due and the rate of interest; d) the object and address of the business; e) the scope of the business; and f) the address of any branch or agency mortgaged with the principal business, if any, and identification mark that the mortgagee has put on the mortgaged property, if any.[37]

4. Lending banks have to also make sure that the business they mortgage is free from prior encumbrances, such as registered legal, judicial or contractual mortgages. Lending banks, on payment of the prescribed fee, can require the official in charge of the register of mortgages to deliver to them a copy of any extract from the register or, where there is no entry for which they are searching, a certificate to the effect that there is no entry.[38]

The seller of a business, for so long as the price of the sale has not been fully paid to him shall be secured by the legal mortgage on the business provided that the sale agreement is in writing and the mortgage has been registered in the manner provided by law during the month within which the sale took place and this legal mortgage shall produce an effect from the date of registration.[39]

Since the creditors of a bankrupt mortgage trader have a legal mortgage over the business, lending banks must also make sure that the business is not bankrupt. So also, since businesses could be judicially attached in the wordings of article 154 of the civil procedure code, lending banks must verify whether or not the business has been judicially mortgaged. As one can understand from the business mortgage agreement of some banks, it can be said that the practice of banks is not in conformity with the provisions of business mortgage. The said some banks, in their mortgage agreements, do only mention the trading license and the equipment or furniture that are elements of the business. They do not enter into an agreement that exhaustively state all the elements of a business even where they intend to charge the entire business. They merely stipulate, in the mortgage agreement, that the entire business including future improvements are mortgaged; which is quite against our discussion above and has been a cause for losing a case before a court that we shall consider under our next chapter.

2.1.1.2. Valid contract of pledge and possession of the pledge

In order there to be a valid contract of pledge, lending banks should carefully observe the relevant provisions of the civil code and commercial code that provide the rules on pledge and enter into a contract of pledge accordingly. It has been said that the earliest form of security was the pledge, in which the creditor took possession of the debtor's asset as security until payment of the debt. The taking of possession of the pledge by the creditor was almost a sine qua non of a

valid security interest. With the development of documentary intangibles, the scope of the pledge increased and hence it could now be applied not only to goods but also to documents of title to goods and to instruments embodying a money obligation.[40]

The close investigation of the laws of pledge embodied in the civil code and commercial code reveal the fact that there are two modes of pledge. These are 1. possession of the goods pledged and 2. possession of titles to goods or instruments embodying a money obligations.

2.1.1.2.1. Possessions of the goods pledged themselves

If there has to be a valid contract of pledge, lending banks must possess the goods pledged unless they agree that the goods pledged be delivered to a third party or unless they shall be deemed to be in possession of the pledge where the document of title, without which the pledge cannot be disposed of, has been delivered to them with in the meaning of the provisions of articles 2830, 2831 and 2832 of the civil code. In all other cases, the contract of pledge shall be of no effect where it stipulates that the pledge shall remain with the debtor.[41]

Where lending banks secure their loans by possessing the goods pledged, they must enter into contracts of pledge in accordance with the provisions of article 2825 and the following of the civil code found under section one of "contracts of pledge in general". Thus, lending banks are advised to make the contract of pledge in writing even where the amount of the debt specified in the contract of pledge does not exceed five hundred birr. Though article 2828(2) provides that "where the amount in the contract of pledge exceeds five hundred birr, the contract of pledge shall not be valid except it is evidenced in writing" in view of sub article one of same article which provides "the maximum amount of the debt guaranteed shall in all cases be specified in the contract of pledge or the contract shall be void", in all cases, be made in a written

form even where the amount of debt secured by the pledge is below five hundred birr due to the conclusive nature of documentary evidence.

2.1.1.2.2. The possession of title to goods or instruments embodying a money obligations

Article 2832(1) of the civil code provides that "the furnishing of a pledge without dispossession of the debtor may be made in such cases only as are provided by law". Therefore, it would be tenable to identify matters that can be pledged by mere delivery of the documents of title to the goods or instruments embodying a money obligations. Article 2830(1) and (2) of the civil code tells us that the creditor shall be deemed to be in possession of the pledge where a voucher for goods warehoused or the bill of lading or way bill in the case of goods in transit, has been endorsed in his favour. Article 2833 (1) of the civil code, also, tells us that the rules governing contracts of pledge are to be found, in addition to chapter 6, Title 17, Book 5 of the civil code, in the special laws relating to particular cases and forms of pledging or to the institution authorized to lend against security.

Let us consider lending on possession of some documents of title to goods and then some instruments embodying a money obligation.

2.1.1.2.2.a. Lending on possession of documents of title to goods

Here, it is necessary to consider the various forms of documents of title and to distinguish between: a) those documents that give a title to the goods named in them; and b) those documents which are merely receipts acknowledging that the goods have been lodged in the warehouse. A voucher for goods warehoused, bill of lading or way bill, etc, are documents that give a title to the goods named in them, where as warehouse keepers' certificate (receipts) and delivery orders are documents which are merely receipts acknowledging that the goods have been lodged in the warehouse.[42]

Notice that since article 2833 (2) of the civil code provides "the special rules governing the committal of goods in warehouses are given in the chapter on warehousing", we shall resort to article 2806 and the following of the civil code with the view to considering how lending banks should possess voucher issued by the warehouse man for the security of their loan. Article 2806 provides the definition of a contract of warehousing as "a contract whereby one party, the warehouseman, being duly licensed for the purpose by the public authorities, undertakes to receive and store goods on behalf of either of the bailer or of the purchaser of the goods or of a person who received them in pledge". Since the warehouse man shall be liable for the preservation of the goods he has received, he shall give to the bailer a receipt for the goods warehoused which shall be accompanied by a voucher containing the same information as the receipt. [43] The receipt and voucher shall be taken from the same counterfoil register and the counterfoil shall be retained by the warehouse man.[44] The particulars in the receipt and voucher shall state the name or trade name and address of the bailer, the place of storage, the kind and quality of the goods stored and any other information necessary to identify the goods and, in addition, whether the custom duties have been paid on the goods and whether they are insured. [45]

It should be noted that the receipt and voucher may be made out in the name of the bailer or in that of a third party designated by him.[46] The said receipt and voucher may be transferred either together or separately, by endorsement.[47] The borrower or a third party who offers to pledge his goods detained at the warehouse should endorse the voucher alone to the lending bank so as the lending bank possess the voucher. In other words, it is when the lending bank is in possession of the voucher which states the amount of the debt and interest thereon and the date on which the payment falls due and the endorsement are entered on the receipt and countersigned by the borrower (pledger) that it can be said that the goods detained at the warehouse are

pledged to the bank.[48] Where the endorsement on the voucher fails to state the amount of the debt guaranteed, the goods stored shall be secured to their full value to guarantee the debt.[49]

The borrower or a third party who intends to pledge the goods stored at the warehouse to the lending bank may also request the warehouseman in order the voucher be made out in the name of the lending bank from the outset.[50] The mere fact that the voucher is made out in the name of the lending bank will only confer the bank the right of pledge. This is because, it is only a person in possession both of the receipt and of the voucher who may demand that the goods stored be handed over to him at any time.[51]

It should also be noted that the warehouseman shall store the goods until the expiration of the agreed period and he may not avail himself of circumstances as a result of which a bailee would be authorized to return the goods before the due date because of unforeseen events.[52]

The borrower or a third party, who pledged the goods warehoused by endorsing the voucher, would only be in possession of the receipt and may only inspect the goods stored and take the customary samples but may not remove the goods stored unless he deposits with the warehouse man the sum due at maturity to the pledgee. [53]

As mentioned above, bill of lading is one of the documents recognized by law as documents of title to goods. In relation to carriage by air, bill of lading is a document issued by the sender (in three copies) of the goods and delivered to the carrier together with the goods,[54] and it may also be issued by the carrier where the sender so requests and deliver the goods to the carrier in which case, unless the contrary is proved, the carrier shall be deemed to act on behalf of the sender.[55]

The bill of lading shall show: a) the place and date of issue; b) the place from and to which the goods are to be carried c) the name and addresses of the sender, the addressee and the carrier; d) the nature, number of pieces, volume or weight of goods; e) the distinguishing marks or numbers

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The bill of lading shall show: a) the place and date of issue; b) the place from and to which the goods are to be carried c) the name and addresses of the sender, the addressee and the carrier; d) the nature, number of pieces, volume or weight of goods; e) the distinguishing marks or numbers

affixed on the parcel, if any; f) the condition of the goods and the nature and condition of packing; g) the cost of transport; h) the time within which and the route whereby the goods are to be carried; i) and a notice informing the sender of the carrier's limited liability for loss of or damage to the goods.[56]

The first copy of the bill of lading shall bear the words " for the carrier" and shall be signed by the sender, the second copy shall bear the words "for the addressee" and shall be signed by the sender and the carrier and shall remain with the goods. The third copy shall be signed by the carrier and handed to the sender after the goods have been accepted by the carrier.[57]

If the addressee has to pledge the goods described in the bill of lading, the said bill of lading should be issued to his order, in order he endorse it to the lending bank.[58]

One may, therefore, understand from the provisions of article 615 of the commercial code that bill of lading has got many functions: vis; 1) since it is signed or verified by the stamp of the carrier before the goods are loaded,[59] it serves as an acknowledgement of receipts of goods for carriage to a specified port of destination. Note, however, that it may be a prima facie evidence that the packages described by marks and identification numbers were received by the carrier. The carrier is not expected to verify the contents and, therefore, is not responsible for the content of the package unless the accuracy of the bill of lading is checked by the carrier in the presence of the sender and the result of the check is certified on the bill of lading or the bill of lading is issued by the carrier himself;[60] 2) the bill of lading shall also serve as the contract of affrightment, subject to which goods are carried by the carrier; [61] 3) the other purpose of a bill of lading is to serve as a document of title to goods while the goods are on transit and until delivered to the addressee or to the endorsee.[62]

It should be noted that when banks extend loan against bill of lading, they have to make sure that the pledger and the carrier are honest and thoroughly reliable. This is because, the bill of lading does not necessarily certify or guarantee the correctness of the contents of the bags or packages. Hence, the lending bank will have no remedy against the carrier, if the packages contain worthless stuff which is quite different from what they are supposed to contain unless the carrier, as mentioned above, has verified the contents of the goods. So also, the bill of lading might be a forged one, or even if genuine, the number of packages mentioned may be altered cleverly as it is difficult to discover such dishonest practices.[63]

Thus, if the addressee or any other person, who pledged the bill of lading, has only a defective title, banks do not acquire a better title since they do only obtain a defective title owing to the fact that the bill of lading is not negotiable and the transferee of such instruments cannot obtain a better title than that of a transferor.[64] Further, banks should ensure that the bill of lading does not contain any prejudicial remarks about the condition of the goods received. [65]

As the unpaid carrier has the right of stoppage in transit, in the wordings of article 623(2) of the commercial code, the lending bank must be sure that the addressee (pledger) has carried out his duties as to payment and transport under the bill of lading.

As it has been mentioned here in above, bills of lading are usually drawn in sets of three, all duly signed and marked as original, duplicate and triplicate. This is done so as to prevent total loss of the document.[66] Therefore, while lending against bill of lading, lending banks, as the pledgee, must obtain the full set of bill of lading. In other words, those copies with the sender, carrier and the addressee should be handed over to the bank.[67]

Having said so much with regard to precautions that lending banks should take while advancing loan against bill of lading, let us now turn to consider how the lending bank should posses the goods represented by the bill of lading. We have already mentioned that the pledger

(addressee) should either endorse and deliver the bill of lading to the pledgee bank so as the transferee of the bill of lading, that is, the lending bank, can take delivery of the goods in his own right or assign the bill of lading that represent the goods by way of a pledge agreement, in which case, the lending bank should obtain authority, to clear the goods from the carrier and to store them and insure them, all at the cost of the borrower. Where the goods are stored at a warehouseman, the voucher should be delivered to the lending bank as it has been discussed earlier so as it evidences the pledging of the goods.

Let us, here under, consider pledge of claim with no title (e.g. book debt) and will switch over to pledging instruments embodying a money obligation.

Banks may also pledge a claim (debt) which has not yet accrued due, such as debts which will fall due under contracts to supply goods or services when the assignor (pledger) has performed his part of the contract or when the time for payment arises under the contract within the meaning of article 2864 and the following of the civil code. An assignment of all sums due or to become due by way of pledging to a lending bank should be made in accordance with article 2864(1) of the civil code that provides "the pledging of claims which are not established by a title shall, regardless of the amount of the sum guaranteed, be executed in the form of a document specifying the claim pledged and the maximum amount of the debt guaranteed".

Unless the lending banks in all cases obtain a document of undisputed date adequately specifying the right pledged and the debt guaranteed, the pledge shall be of no effect in the wordings of article 2865(2) of the civil code.

This is because the mentioning of the date and the amount guaranteed in the pledge would enable lending banks to establish their priority right over the claim against other lenders or trustees in bankruptcy as envisaged under article 1029(b) of the commercial code.

Since the debtor who is to pay the assigned debt may set up against the pledgee bank the defenses he is entitled to raise against his own creditor (the assignor), banks must make sure that the said debtor has accepted the pledging without reservation and that there is no counter-claim which arose against the assignor (the pledger) prior to the acceptance of the debtor.[68]

The pledgee bank shall collect the debt pledged with it when it falls due and where the debt is periodically due bearing interest, it shall collect the interest on the claim pledged and all other periodical payments due from the debtor and shall apply the proceeds successively to the expense due to itself, to interest and to the capital of the debt guaranteed. [69] Where the pledger objects to such payment, the debtor may obtain his discharge only by depositing the sum in the place agreed upon by the parties (the pledgee bank and the pledger (assignor)), and in the absence of such agreement at a place fixed by the court. [70]

2.1.1.2.2.b. Lending against pledging instruments embodying a money obligation

When article 2833(1) of the civil code stipulates "the rules governing contracts of pledge are to be found, in addition to Chapter 6, title 17, book 5, in special laws relating to particular cases and forms of pledging or to the institution authorized to lend against security", it is certainly referring to, amongst others, the commercial code. Article 2866(2) of the same code, which provides "the pledging of claims and rights established by negotiable instruments shall be carried out in accordance with provisions of article 950 - 958 of the commercial code", makes the matter further clear, hence these instruments embodying a money obligation are securities.

Where banks pledge securities, that is, instruments embodying a money obligation such as bill of exchange, promissory notes, life insurance policies, shares, treasury bills, etc, as envisaged under article 947 and the following of the commercial code, they have to carefully

observe the rules governing the pledge and sale of these instruments provided elsewhere in the commercial code or the civil code.

It is, however, beyond the scope of this paper to go in detail into analyzing all the rules governing these instruments and therefore, we will only consider the rules applicable to foreclosing these securities owing to default in the chapter to follow.

2.1.2. Statutory power of sale or the power created under mortgage or pledge agreement

Since we have already discussed the statutory power of sale or the power created under mortgage or pledge agreement under chapter one of this thesis, under this section few things would briefly be discussed here below.

One can boldly say that proclamation No 97/1998 has only been proclaimed having mortgage of immovable in mind and without taking into account the laws of pledge embodied in the civil code. Since banks had no practice of pledging documents of title to goods, claims or instruments embodying a money obligation such as those we have briefly mentioned above, they have failed to remind the legislator in order it takes in to account the rules on sale of pledge contained in the civil code when it issued proclamation No 97/1998.

On top of this, until the coming into force of the business mortgage proclamation No 98/1998, no bank has entered into a business mortgage agreement, which is in accordance with the laws of business mortgage provided in the commercial code and caused the registration of same in the Awraga Court in accordance with article 1175 (2) of the commercial code as article 14 of proclamation No 98/98 has carefully provided let alone to include power of sale of the lending bank in their contracts of business mortgage. Thus, in effect, the statutory power of sale

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is not at all applicable to business mortgage made prior to the coming into force of laws of power of sale foreclosure which we shall consider under our next chapter.

2.2. Conditions For The Exercise of Power of Sale Foreclosure

2.2.1. Default

A mortgagee bank has no right of sale if there is no default in payment of the loan as per the agreement made between the lending bank and the borrower. There can be default in payment of the principal amount of the loan or the interest computed on the principal amount if not paid as per the repayment period scheduled in the loan agreement. The problem with regard to default is that, the laws of power of sale foreclosure, the civil code, the loan agreements of banks and the directive of the National Bank of Ethiopia, understand the term "default" in a not similar manner.

The English version of article 3 of Proclamation No 97/998 stipulates that the lending bank, whose claim is not paid within the time stipulated in the contract, can sell the property mortgaged or pledged by auction upon giving a prior notice of at least 30 days to the debtor. The Amharic version of the same article omits the term "contract" and merely says" in the time stipulated", where as article 13 of Proclamation No 98/1998 simply says "whose claim is not paid".

With regard to the variation of the Amharic and English versions of article 3 of Proclamation No 97/1998, it is not necessary to resort to the official Negarit Gazeta proclamation so as to identify which version should prevail owing to the fact that the time stipulated is, no doubt, the time provided in the loan contract and thus the English version seems sound and complete. But with regard to the provision of article 13 of the Business mortgage Proclamation,

it may be said that the phrase "whose claim is not paid", though vague, still presupposes the time stipulated in the loan agreement.

According to the provisions cited above, the lending bank, unless it decides otherwise, can give prior notice of 30 days from the next day following the day on which the loan is scheduled to be paid but has not been paid accordingly. Thus, according to the laws of power of sale foreclosure, the lending bank can give the notice immediately following the date on which the loan has to be repaid, even where the loan is scheduled to be repaid by installment, that is to say, failure to pay the first and single installment, may enable the bank to initiate power of sale foreclosure.

The civil code's approach is different; it is because, in case of non-payment of interest computed on the principal loan, the creditor may not demand the repayment of the entire loan amount, unless the borrower is in arrears for two consecutive payments representing together at least one tenth of the capital lent. Likewise, where it has been agreed that the capital lent shall be repaid by installment, it is only where the borrower is in arrears for two consecutive payments representing together at least one tenth of the capital lent that the creditor may demand the repayment of the entire loan.[71] Where the loan agreement that the creditor and the debtor entered into fails to respect these provisions of the civil code, it shall be of no effect. [72]

Here, the question one may raise is that, are not these provisions of the civil code replaced by article 3 of proclamation No 97/1998 in view of article 12 of the same proclamation that provides "any law which is inconsistent with this proclamation shall not be applicable"? Notice that Proclamation No 98/1998 is very silent with regard to inapplicable laws. The other question one may also raise is that what would the solution be, where the loan agreements fail to stipulate the time within which the loan has to be paid?

The civil code has a readymade answer which is provided under article 2483(1) and states "the borrower shall return the thing lent within one month from the day when the lender claims the restitution of them". Banks in this country, in almost all instances, provide, in their loan agreement, time of payment of a debt. If, however, the said time of debt payment is not provided, their remedy is to resort to the above mentioned provisions of the civil code.

The National Bank of Ethiopia Amendment of Provision, Directive No SBB/28/2002/, article 6 classifies non-performing loans or advances under its sub article 6.1.1., 6.1.2 and 6.1.3. as substandard, doubtful and loss respectively. Non-performing loans or advances past due 90(ninety) days or more but less than 180 days shall, at a minimum, be classified as substandard, non-performing loans or advances past due 180 days or more but less than 360 days shall be classified at a minimum, as doubtful and non-performing loans or advances past due 360 days or more shall be classified as loss. The directive, under its article 7.3, requires banks to maintain the minimum provision percentages of 25% for loans classified as substandard, 50% for loans classified as doubtful and 100% for loans categorized as loss against the outstanding principal amount of each loan or advance. It would not, therefore, be difficult to point out that where a loan or advance is not paid within 90 days from the date scheduled in the loan agreement, the loan is considered non-performing. Non-performing loans are obviously in default and unless rescheduled, have to be foreclosed. Hence, the classification no doubt, demonstrates loans in default. And, therefore, one can say that, in view of the directive of the National Bank of Ethiopia, a loan is said to be in default if not paid within 90 days from the date of payment.

Loan and mortgage and/or pledge agreements of various banks do provide default clauses as they think suitable to the types of loans they advance to their borrowers. Term loan agreement of CBE, which states, under its article one, that a loan advanced to a borrower shall be repaid in a monthly installment within one year, does provide under its article 14, that if a borrower does not

pay its total debt, the bank shall sell the property mortgaged or pledged by public auction or in private. Even though the default clause is open to different types of interpretations, one may hold that it is only when the borrower fails to pay the entire loan amount at the end of a given year that the bank will initiate power of sale foreclosure despite the fact that the loan is to be repaid by installments. The over draft loan agreement of CBE, article one that indicates the loan amount granted to the borrower provides that the loan advanced to the borrower may be canceled at any time. This loan agreement, no where mentions when the loan should be repaid but, under article 1.4, it enunciates that where the borrower fails to settle the entire loan amount, CBE shall sell the property mortgaged or pledged by public auction or in private. Unless, the bank resorts to the provisions of the civil code which we have already discussed, its poorly drafted over draft loan and mortgage and/or pledge agreement is problematic. As this loan agreement states that the sale of security in private is possible, it violates the mandatory provisions of the proclamations.

One of the standard loan and mortgage and/or pledge agreement of DBE, under its article 2.01, clearly provides repayment schedule for the principal loan amount. As the loans of this bank are dominantly long term, the loans usually are to be repaid in 10, 12, 14, 16, 18, or 20 equal semi annual installments. The said loan and security agreement under its article 1.04, among other things, provides that interest that would be computed on the principal loan amount shall be paid together with the principal loan. It is article 5.02 of the loan and security agreement of DBE that stipulates that when the principal loan, interest and other expenses incurred due to the loan should be paid and/or repaid according to the repayment schedule and failing which the bank shall sell the property mortgaged or pledged by a public auction.

The loan and mortgage agreement of DBE, one can boldly say, is in harmony with the provisions of article 3 and 4 of proclamation No 97/1998 and article 13 and 14 of proclamation No 98/1998; that is to say, the bank can initiate power of sale foreclosure by giving 30 days prior notice when a borrower fails to pay a single installment.

The standard loan contract of CBB, under its article 13(b) (c) (d) and (e), provides respectively that there be default in repayment of any installment of the principal loan or there be default in the payment of two consecutive installments of interest together representing at least ten percent of the amount advanced under the loan agreement or there be the death, interdiction, bankruptcy or insolvency of the borrower.

The approach of the CBB is different from other banks' practice so far considered and also is not in conformity with the laws of power of sale foreclosure. It is because the laws of power of sale foreclosure permit the exercise of power of sale only and only if the borrower fails to pay his debt. If the borrower dies or alienates security or violates any of the provisions of the loan and security agreement but does not fail to pay its debt, banks may not exercise power of sale though they may not be denied of their right to take the case to courts of law for judicial foreclosure invoking their contract and/or the provisions of laws such as article 3073(1) of the civil code.

Although the default clauses in the loan and mortgage or pledge agreements of lending banks do serve to determine the time, after which, a loan be referred to their foreclosing unit, it is only where the borrower fails to settle his debt after he has been served 30 days prior notice that he is said to be in default within the meaning of article 3 and 4 of proclamation No 97/1998 and article 13 and 14 of proclamation No 98/1998. To put it otherwise, it is only after the mortgagor's or pledger's default in payment continues for a maximum period of one month or for such other period stipulated in the mortgage or pledge agreement after service of notice that the property

mortgaged or pledged can be sold or foreclosed by public auction. It should however, be noted that the thirty days prior notice and the 15 days long proclamation of sale required under the civil procedure code must not be applicable to pledge, despite the fact that the above mentioned proclamations enshrine otherwise, for those reasons stated under the section to follow.

2.2.2. Notice of intention to foreclose

Neither the aforementioned proclamations nor articles 1773(1) of the civil code that one may think relevant, at least by analogy, to the case at hand, no where mention that notice of intention to foreclose be in writing. However, for the purpose of preserving secure evidence of notice of default, it is, of course, desirable to make it in writing.[73] In countries such as the United States, United Kingdom, India, Jamaica, etc, notice of intention to foreclose is required to be in writing.[74]

It has been said that the general objective and paramount importance of the said notice is that the mortgagor or pledger be notified of the mortgagee's intention to exercise his power of sale and to give the borrower and/or mortgagor time to forestall the sale.[75] In spite of the fact that the borrower and/or the mortgagor or pledger must be presumed to know whether he is in arrears, the requirement of notice seems mandatory under Ethiopian Legal System as can be understood from the provisions of articles 3 and 4 of proclamation No 97/1998 and articles 13 and 14 of proclamation No 98/1988. Anyway, if circumstances could arise in which a debtor is not truly in default (due to mistake or miscalculation on the lender's part) the servicing of such a notice will enable the lending bank to rectify its mistake or miscalculation due to the response of the borrower and hence notice seems essential regardless of its being a legal requirement.

Another issue worthy of contemplation is what period of notice would be sufficient for debtors who pledge their property. According to Proclamation No 97/1998, the period of notice

for both a pledger and mortgager is thirty days. The question is, are the said 30 days long period of notice proper for a pledger though they may be proper to a mortgagor? The 30 days long period of notice required under the proclamation is not compatible with the laws of pledge embodied in the civil and commercial code.

Notice that the goods pledged by a debtor could be coffee, cotton, fresh fruits or vegetables, etc harvested from farm land and delivered to the pledgee itself or to a warehouseman for the purpose of securing a loan payable with in few days or maximum of a week. Such types of goods pledged are either perishable so it should be realized very quickly or due to their high price at a given point in time be disposed of urgently. It seems due to such reasons that the pledgee is permitted to cause the sale of such pledge by public auction after giving 8 days prior notice to the pledger even where the pledger could raise unfounded objection.[76] It should further be noted that where the pledge is quoted on the market or has a current price, the pledgee may cause the sale of the pledge by private contract through the intermediary without even giving the said 8 days prior notice to the pledger.[77]

The warehouseman is also duty bound to sell the goods pledged at his warehouse without being required to give notice to the pledger and the pledgee, whenever the goods stored at his warehouse are in danger of decay.[78] Where the lending bank which has advanced a credit against goods stored at a warehouseman and in possession of a voucher, is not paid on maturity of the loan, should, first of all, protest for non-payment on one of the two working days following the day on which the debt is payable in the wordings of article 2821(1) of the civil code cum article 781(4) of the commercial code. The lending bank, then after, may cause the goods to be sold eight days after payment becomes due as stipulated under article 2821(1) of the civil code.

Article 2873 of the civil code tells us that where a loan advanced against pledging a debt or instruments embodying a money obligation has become due, the pledgee bank may cause the sale of the securities or the debt pledged with it as per article 2854 of the civil code.

This means that where the loan that a lending bank has extended against securities such as bill of exchange, promissory note, etc, becomes due, the bank has to first protest for non payment on one of the two working days following that day on which the pledged security is payable in the wordings of article 2821(1) of the civil code cum article 781(4) and 825(1) (d) of the commercial code before it causes the sale of the instrument as per article 2854(1) or (2) of the civil code. But note that where the loan and the instruments pledged become simultaneously due, the pledgee bank may not be able to sell the instrument. In such cases the pledgee bank should rather bring a lawsuit joining the pledger and the drawer or the marker of the instruments if the pledger and the marker /drawer are not one and the same person after having put the drawer/ maker in default as per article 781 or 825 (1) (d) of the commercial code and after giving notice of non-payment to the pledger, endorser, if any, and maker or drawer pursuant to article 788 cum article 825 of the commercial code before the period of limitation for these securities runs.

Thus, one can boldly say that with regard to the notice of intention to foreclose a pledge such as, goods, a debt or security (instrument) pledged, though the civil code has provided universally accepted principles, proclamation No. 97/1998 has erroneously provided a prior notice of 30 days which is equal to a period of notice required in cases of a mortgage. Where the proclamations provide the said 30 days prior notice and public auction as a requirement for the sale of a pledge, they have totally failed to take into account the nature of a pledge. Such gross negligence on the part of the banks which in fact initiated the laws and the legislator that legislated the laws must be rectified so as the laws be compatible with the provisions of the civil code on sale of pledge that are modeled after the laws of industrialized

countries that are enacted on the basis of vast practices and experiences of the merchants and their public at large.

At this juncture, what may the content of the said notice be is a point that one may raise. The above mentioned proclamations do not help us as such since they merely say "upon giving a prior notice of at least 30 days". The practice of lending banks, as it can be understood from their notice so far given to the debtors seems sound. Their notices, among other things, include: the loan account in default, the date of the loan and mortgage or pledge agreement, the loan amount disbursed, the name of the borrower and the mortgagor or pledger, the property mortgaged or pledged, the loan amount in arrears, the duration of notice within which the borrower should settle the loan amount in arrears, the measure that shall be taken if the arrears is not paid with in the period of notice, that is, the intention to foreclose the security held and use the proceeds of sale for the settlement of the entire outstanding loan amount, including outstanding interests and expenses incurred owing to the sale of the mortgage or pledge. The practice of banks in Ethiopia would enable to avoid litigation that arises due to lack of clarity of notice of intention to foreclose particularly where they fail to state the specific amount of money and the loan account in arrears and the property to be foreclosed as in United Kingdom, USA, India, etc.[79]

Another issue worthy of contemplation is to whom should notice of intention to foreclose be given. Articles 3 and 4 of Proclamation No 97/1998 and article 13 and 14 of Proclamation No 98/1998 stipulate that the notice be given to the debtor. The term debtor should not be taken to mean the borrower only. This is because, there are many instances where a person mortgages or pledges his property to secure the debt of another person, the borrower. In such cases, the lending bank should also give notice not only to the borrower but also to the mortgagor or pledger. The said mortgagor or pledger particularly those who have no idea of the loan status, up on notification, would get the opportunity to discuss the matter with the borrower and/or with the

lending bank either to redeem their property by settling the amount accepted by the lending bank as per the wordings of article 3101 and the following of the civil code or to pressurize the borrower in order he settle his debt or to seek any other solution to forestall the foreclosure.

CHAPTER THREE

Sale of Mortgage or Pledge, Application of the Proceeds and Disposition of Surplus, Resort to the Judiciary and Delivery of the Property Sold to the Purchaser or Transferring Ownership of same to the Foreclosing Bank

3.1. Valuation of the Mortgage or Pledge to be Sold and Advertisement of Sale

3.1.1. Valuation of the mortgage or pledge to be sold

Articles 3 and 4 of Proclamation No 97/1998 require a mortgage or pledge to be sold by public auction. So also, the laws of pledge contained in the civil code, under article 2854(1) provide that the pledge, when appropriate, be sold by public auction. The proclamations do not, however, expressly provide that the property should be valued, that is to say, their floor price be provided so as to fixing the minimum bid. Nonetheless, one can, at least, infer from article 424 (2) of the civil procedure code which we believe that it is one of the articles cross referred by article 6 of Proclamation No 97/998 and article 17 of Proclamation No 98/1998 and to which lending banks should adhere to, in the process of selling the pledge or mortgage and article 2856 of the civil code that provides whenever pledges are sold by public auction their value or price shall be estimated.

It has been said that in USA, it is a quite common practice to fix a minimum or upset price for the property to be sold by public auction, otherwise, the large amounts involved in the sales of some of such properties might tend to discourage competitive bidding and result in the sale of the property for a grossly inadequate price.[1]

Banks in Ethiopia invariably do estimate the value of the property to be mortgaged or pledged at the time of the contract of loan and mortgage. Nonetheless, it is only some banks that used to state the said estimated value in their contract of mortgage or pledge. DBE and CBB, albeit the fact that they estimate the value of the mortgage or pledge, they usually do not state the said estimated value in their contracts of mortgage or pledge. Banks, which state the estimated value in their contracts of mortgage or pledge and those banks which do not state the said estimated value in their contracts of mortgage or pledge, re-estimate the value of the mortgage or pledge at the time of the sale with the view to notifying the public of the minimum price in their advertisement of sale of the mortgage or pledge. The lending banks carryout the re-estimation of the value of the mortgage or pledge for some reasons: the first reason is that the estimated value of the mortgage or pledge at the time of contract of mortgage or pledge may depreciate or appreciate as the time between the contract of mortgage or pledge and sale of mortgage or pledge could be longer to justify re-estimation; the second, and perhaps the more convincing reason is that the valuers of lending banks mostly give an exaggerated estimation to the value of the mortgage or pledge at the time of the contract of mortgage or pledge due to undue collaboration with the borrower and/or mortgager or pledger.

The re-estimation is carried out mainly to protect lending banks from the consequences of articles 3 and 4 of Proclamation No 97/1998 and articles 13 and 14 of Proclamation No 98/1998 since these articles of the proclamation do state that "where the mortgage or pledge is not sold at the 2nd auction, lending banks have to transfer the ownership of the mortgage or pledge to themselves in consideration of its estimated value as specified in the contract of loan".

In order to undertake the re-estimation of the value of both movable and immovable property and thereafter facilitate conducive situation for potential bidders to inspect the property within the period of notice of sale, lending banks dispossess and/or seize and take posession of

these properties prior to public auction with the assistance of the registrar and police force. As it has already been mentioned earlier, article 8 of Proclamation No 97/1998 and article 18 of Proclamation No 98/1998 have empowered the government organ namely "the registrar" which is said to be responsible for registering an immovable property or witnessing the signing of a contract of pledge and deposit same, or incase of business mortgage, the bureau which has registered the business mortgage, to take the necessary measures for carrying out the sale by auction where necessary by even ordering the police force.

Accordingly, where movables such as vehicles have to be seized prior to public auction but after the expiry of the period of notice of intention to foreclose, lending banks request the registrar in writing in order the registrar give the necessary order to the concerned police force units to seize the vehicles and deliver to them. The written request of lending banks usually states the type of vehicle, its plate, motor and chassis number, and that the lending bank has held the vehicle in security as per the agreement made with the owner of the vehicle and the agreement has been registered by the registrar and that the debtor has defaulted to repay the loan after a notice and that the said vehicle be seized by a traffic police and handed over to it.

The said registrar, upon receiving the request of the lending bank, gives order to every police commissions of national regional governments including the Addis Ababa Police Commission so as the vehicle be seized and delivered to the lending bank. The police commissions, in turn, order traffic police units organized under them in order they seize the vehicle and deliver it to the lending bank. Where the vehicle is seized, the police informs the lending bank and the lending bank takes over the vehicle so seized from the driver and/or the owner of the vehicle after undertaking instant inspection and giving a receipt of delivery to the owner of the vehicle. Such practice of lending banks is in line with the provisions of article 436(1) of the civil procedure code that permits seizure of movable property prior to public

auction. It is true that, unless, movables such as vehicles are seized prior to public auction, it would not be possible to undertake inspection and estimation of their value and display them to potential bidders at a place easily accessible.[2]

Lending banks do also dispossess immovable or businesses mortgaged with them prior to public auction. Lending banks usually request the registrar of immovable mortgage or business mortgage in writing so as the registrar gives an order to the police and the kebele administration so as these organs assist the delivery of the said mortgage to it. The registrar, upon receiving the request of the lending bank that states, among other things, that the lending bank has a mortgage right registered by the registrar, that the borrower has defaulted after the notice of demand of payment of the loan, and the description of the property mortgaged, in turn gives an order to the police station and the kebele administration of the place (locality) where the mortgaged house or business is situated to enable the delivery of the mortgage to the lending bank. The registrar also informs the mortgagor to hand over the mortgage to the lending bank in accordance with the relevant proclamations so far considered. The lending bank takes over possession of the mortgage against the receipt that it gives to the mortgagor and deploy its own guards to protect the property from theft or similar harms.[3]

The practice of lending banks with regard to delivery of the mortgage prior to public sale is not in line with articles 448 and 449 of the civil procedure code. The dispossession of the business mortgage prior to sale, in particular, results in the closure of the business, termination of employees and disband of customers of the business which, in effect, causes the total devastation of the good will of the business.

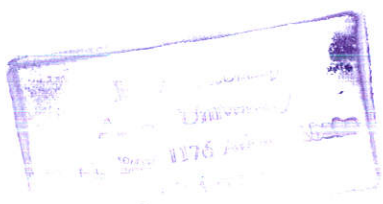
The dispossession and re-estimation of the value of a mortgage has caused to move a number of borrowers and/or mortgagors to file a law suit before courts so as the courts decide that the estimated value stated in the contract of mortgage be the minimum or upset price which

has to be specified in the advertisement of sale of the mortgage or that the value of the mortgage be estimated by a neutral professional third party.

Lending banks that were prevented to exercise power of sale due to such law suits once again persuaded the legislator to amend the laws of power of sale foreclosure (the two proclamations so far considered). Due to the strong appeal of banks, the phrase "to take over the mortgage or pledge in consideration of its estimated value as specified in the contract of loan", inserted under article 3 of Proclamation No 97/1998, has now been deleted and amended by the phrase "if no buyer appears, at the second auction, to acquire the property at the floor price set for the first auction and have the ownership of the property transferred to it "(the lending bank) as per Amendment Proclamation No 216/2000 issued to Amend the Property Mortgaged or Pledged With Banks.

Even after the before mentioned amendment, a number of cases that do involve similar issues do flow to courts prior to the sale of the mortgage, although many of such cases are finally resolved in favour of the lending banks after months or years of litigation and resulting in suspension of the power of sale of the banks.

In a civil case, Bekele Alemu V DBE, the plaintiff, Bekele Alemu, sued the defendant, DBE, before Jimma Zone High Court, alleging that the defendant has underestimated the value of his own house and the house of the third party which has been mortgaged with the defendant to secure the repayment of birr 38000.00 that he has taken from the defendant in the form of a loan. The plaintiff further alleged that his house situated in Mizan town and which was estimated for birr 57,328.25 at the time of the contract of mortgage has been estimated, for the purpose of sale by auction, for birr 19,371.00. The value of the house of Ato Demeke Desalegn, the third party mortgagor, is also estimated much lower than its estimation at the time of the contract of mortgage and prayed that the court decide that the estimated value specified in the contract of



mortgage be the minimum price (value) for the bidding. The plaintiff has also petitioned for an injunction order over the defendant's power of sale until the court disposes of the suit. The defendant contended that the plaintiff cannot bring a law suit against a lending bank that exercises power of sale foreclosure before the sale is accomplished and proves that he has sustained damage pursuant to article 7 of proclamation No 97/1998 which provides "the bank shall be liable for any damage it causes to the debtor in the process of selling by auction in violation of the relevant provisions of the civil procedure code, article 394-449.

Though the court has given an injunction order and suspended the power of sale of the defendant for over 4 months, on July 18,1993 (E.C), it decided in civil case file No 3/94 in favour of the defendant saying that the plaintiff did not adduce sufficient evidence that proves whether he has sustained damage or not prior to the sale as per the wording of article 7 of proclamation No 97/1998.

In another civil case, Yohannes Lalago v DBE, the plaintiff Yohannes Lalago, brought a suit against the defendant, DBE, before the Kembata Alaba and Timbaro Zone High Court, alleging that the defendant has estimated the value of his house only for birr 82,058.00 for public auction whose estimated value was birr 280000.00 at the time of contract of mortgage and prayed that an independent professional third party estimate the value of his house so as the estimated value of the professional serve as a minimum bidding price. The court, in civil case, file No 4/94, on Tir 20/1994 E.C, held that the Zonal Work and Urban Development Department estimate the said value despite the argument of the defendant that the plaintiff has no cause of action prior to sale, since the plaintiff did not prove that he has sustained damage.

In another civil case, Tadesse Kusa v DBE, the plaintiff, Tadesse Kusa, sued the defendant, DBE, before West Wolega Zone High Court, alleging that the defendant has unduly estimated the value of his dwelling house for only birr 42,298.00 to make it serve as a floor price

for public auction. The plaintiff has also stated that the estimated value of his house was birr 128,482.00 at the time of the contract of mortgage and requested the court in order a professional third party be ordered to estimate the said value. The court, after nearly a year from the date of the suit, resolved the case saying that the plaintiff may not bring a law suit before the sale of the mortgage and proves that he has sustained damage.

The issuance of the above mentioned amendment proclamation, though relieved banks from transferring the property that could not be sold as the 2nd auction to themselves for the estimated value specified in the loan contract but for the floor price set for the first auction, did not prevent mortgagors or debtors to file a law suit before the sale of the mortgage nor the courts to entertain such cases involving issues such as who should estimate the floor price. Although courts, after somewhat lengthy trial, decide in favour of lending banks, on the ground that the debtors/ mortgagors cannot file lawsuits prior to sale of the property mortgaged and show that they have sustained damage, such ultimate verdict of the court may not as such be said that it is against the true interest of the debtors. It is because, where courts, from the outset, could dismiss the case on the ground that they lack competence or the borrower/mortgager has no cause of action, they do usually entertain the case thereby giving injunction orders over the power of sale of the lending bank, in effect allowing the debtor to purchase time for repayment of the loan. It is in a rare instances that courts, as in a civil case, Abay Hizkias V. DBE, do dismiss the suits of debtors or mortgagors on the ground of lack of cause of action for filing a law suit involving issues of estimation of value of the mortgage. Even then, the decision of courts does not at all resolve the issue "who should undertake the estimation of the property mortgaged or pledged"?

In a civil case, Abay Hizkias V DBE, the plaintiff, Abay Hizkias, sued the defendant, DBE, before the Federal First Instance Court, situated in Addis Ababa, alleging that the bank's floor estimation of the value of his house at the time of sale is much less than the estimated value

during the loan and mortgage agreement. The court, on Megabit 8, 1996 (E.C) held under file No 31943 that the plaintiff has no cause of auction to file the suit prior to the sale and before he sustained damage.

The valuation of business mortgaged is more difficult and has found to be a bone of contention between lending banks and mortgagors of business, owing, among other thing, to the fact that lending banks do frequently dispossess the business mortgagors of their business prior to public sale. Lending banks do give notice of sale to the public after disbanding the employees and customers of the business, in effect, entirely destroying its good will. What, in fact, the lending banks do offer to the potential purchasers is only a few equipment of the business and the right to lease the premises of the business where the business is carried out in rental premises which we shall examine under the section that deals with sale of property mortgaged or pledged.

With regard to valuation of a pledge for the purpose of determining its floor price for a public sale, it all depends on the type of the pledge itself. Where, for instance, goods at warehouse are pledged, their value may be estimated like that of a mortgage, nonetheless where instruments embodying a money obligation such as bill of exchange, promissory note, treasury bill, etc are pledged and are presented for public sale before their date of maturity but where the debt for which the instrument pledged has become due, the instrument so pledged need not require valuation. In such cases, it is rather the potential buyers who should shoulder the task of valuation so as to enable them determine the rate at which the face value of the said instrument should be discounted.

Before leaving this section, it may be necessary to respond to the question we have raised in the preceding parts of the section of this chapter. Recall that the question was who is empowered to estimate the value of property mortgaged or pledged where lending banks are required to carry out public auction. The two proclamations do not have clear provisions that can

assist us to resolve the question posed. In our previous discussion, we have seen the contention of lending banks and mortgagors and the rulings of courts on such issues. Courts do not, as such, frame and resolve the issue before them despite the fact that the litigation of parties clearly reveals the issue "who should estimate the value of the property mortgaged or pledged with banks for the purpose of public auction"? Where mortgagors argue that no law permits banks to estimate the said value, the response of banks, in short, is that it is only after a public sale is carried out and the mortgagor suffers damage as a result of failure of banks to observe the relevant provisions of civil procedure code arts 394- 449 that the mortgagor can file a law suit in order the bank be held liable for the damage that the mortgagor or pledger has sustained. The argument of lending banks is based on art 7 of proclamation No 97/1998 and article 17 of proclamation No 98/1998 that do, in identical manner, provide "the bank shall be liable for any damage it causes to the debtor in the process of selling by auction in violation of the relevant provisions of article 394-449 of the civil procedure code". So also, the bases for the rulings of the courts are these same articles which provide the liability that the lending banks should assume where they fail to adhere to the provisions of the civil procedure code which are said to be relevant.

Even though the task of identifying the said relevant articles from those provided under articles 394 - 449 of the civil procedure code seems not easy, article 424(2) of the civil procedure code, whose applicability is not subject to doubt, provides that it is the court that may appoint an expert to estimate the value of the property to be sold by public auction. It goes without saying that, as per the wordings of this article, it is a third party who should estimate the value of the property to be sold. If, therefore, banks have to adhere to the said article without any alteration to meet their need, should they also equally adhere to articles such as 422(2) (a) of the civil procedure code that provides that it is the officer of the court or such other person as the court

may appoint as an auctioneer who should conduct the public auction? Such argument will, no doubt, defeat the very purpose of the laws of power of sale foreclosure, if banks have to always resort to the judiciary so as to obtain the order of court that determines who should estimate and/or auction the property mortgaged or pledged with banks. One can therefore, safely, conclude that not only identifying the relevant provisions from the said articles of the civil procedure codes is necessary, but also, alteration of same to suit the needs of the lending banks.

It is, however, submitted that banks instead of undertaking the estimation of the value of the property to be sold themselves after having modified article 424(2) of the civil procedure code, they have to, at least for the sake of justice, be assisted by a neutral third party professional valuer. In countries such as India and UK even where a mortgagee is not obliged to obtain an independent prior valuation to determine the market value on the basis of which to fix a reserve price, it has been said that to obtain the valuation of a third party is preferable.[4]

3.1.2. Advertisement of Sale

Articles 3 and 4 of proclamation No 97/1998 and articles 13 and 14 of proclamation No 98/1998 provide that the lending bank should sell the property mortgaged or pledged with it only by public auction. So, it would be imperative to resort to the provisions of the civil procedure code that are said to be relevant and applicable to notice of public auction. It is article 423(2) of the civil procedure code that states the content of advertisement of sale. The advertisement of sale, which, in the wordings of article 423(2) of procedure code, is termed as a proclamation of sale by public auction, shall state the time and place of sale and has to specify as fairly and accurately as possible the following information: 1. the property to be sold and the estimated value thereof; 2. any encumbrance to which the property is liable; 3. the amount for the recovery of which the sale is exercised; 4. the terms and conditions of the sale and the manner in which

and the time within the purchase price shall be paid; 5. all other information which the lending bank considers essential for the bidders (purchasers) to know in order to judge the nature and value of the property.

The proclamation of sale ought to contain such a description of the property to be sold as will enable intending purchasers, in the exercise of ordinary diligence, to identify it. It should give as full and complete a description of the property as is possible in the exercise of ordinary diligence for that purpose, in view of the character, condition and location of the property.[5] In this respect, the practice of lending banks in Ethiopia reveals both good and bad trends. With regard to notice of sale of immovable mortgage or a vehicle, the practice is not as such bad, it is, may be, due to the guiding provisions of the civil procedure code that we have already considered herein above and the vast experience that banks have on the public sale of these properties.

For instance, the bank of Abyssinia's (S.C) notice of sale of a house provides the location of the house specifically stating the city, district (Woreda), and kebele with in which the house is situated, the house number, the floor price, the purpose for which the house may be used, the title deed of the house, the size of the plot of land , the built up area of the house and the date of the sale (auction), time for registration of bidders, and time for bidding as well as the name of the defaulting borrower and/or the mortgagor. The said proclamation of sale also states that the bank is empowered to carry out the auction by virtue of proclamation No 97/1998, that bidders should deposit 1/4 of the floor price in order to take part in the bid, that the winner of the bid should settle the entire price of the house within 15 days from the date of the auction, that potential bidders can visit the house to be auctioned. The notice of sale does not, however, state the debt the bank needs to be settled.[6]

AIB's contents of notice of sale of a house is almost similar with the notice of sale of that of bank of Abyssinia. Nonetheless, it does not state the time allotted for registration of bidders and the time reserved for bidding. Like the notice of sale of Bank of Abysinia, the AIB's notice of sale does not state the amount of debt for the settlement of which the auction is to be carried out.[7]

With regard to notice of sale of vehicles, AIB's practice is different from its notice of sale of building considered here in above and it is in the form of notice for tender. The said notice for tender states that the bank is empowered to sell the vehicles mortgaged by defaulting borrower and that the tenderers can obtain the tender document up on payment of a nonrefundable fee of birr 30 from the bank, that the tender must be accompanied by a bid security of 20 % of the floor price of each vehicle and be submitted in the form of CPO, that tenderers should submit their offer for every vehicle they intend to purchase in an independent and separate sealed envelope to the bank.

Moreover, the notice for tender states the closing date, time for submission of tender document, tender opening time, date and the place where the tender document shall be submitted. The notice for tender also states that tenderers can inspect the vehicles specifying the place where the vehicles are available and that the bank reserves the right to reject the tender in part or in whole.[8]

Notice that the notice for tender does not describe the property to be sold, rather it only tells what kind of property is tendered. The description of the property, the floor price, etc are provided in the tender document. It is only persons who buy the tender document who may have the opportunity to appreciate the description of the property to be sold and be encouraged to participate in the tender unlike the sale proclamation that describes in detail the property to be sold to encourage all potential buyers amongst the public. So also, although it has been said that

auction in Ethiopian law shows that it is a special solicitation of offers to buy, with a view to accepting the highest offer, if satisfactory, and conversely advertising for tenders which is a solicitation of offers to sell, with a view to accepting the lowest or best offer, if satisfactory,[9] banks do tender or auction the property mortgaged or pledged for the public to reach a high price.

It should be noted that article 423, which is said to be one of the relevant provisions of the civil procedure code to public sale, provides for public auction but not tender. DBE'S proclamation of sale of vehicles, among other things, depicts the type of vehicle to be auctioned, its years of manufacture, motor, chassis and plate No, whether the vehicle is in a good working condition or not, it's floor price, the place, date and time of the public sale, the requirement that potential bidders should meet, etc.[10]

Notice of sale of goods pledged depends on the type of goods. For instance, AIB's notice of sale of textiles pledged depicts:- the type of the textile and its size in yard; that the place where the goods (several types of textiles) are stored; that potential bidders can inspect the goods; the estimated value of each type of textile; the date, place and time of sale and the conditions that bidders have to fulfil to take part in the bid, etc.[11]

With regard to notice of sale of a pledge of a money obligation (instruments), one may think that articles 423 and 426 of the civil procedure code are applicable since these instruments are considered as movable properties. However, unless we hold that the laws of pledge contained in the civil code and commercial code are applicable to the sale of a pledge, and if we think that these articles of the civil procedure code should apply, the length of notice of intention to foreclose a pledge which is required to be a minimum of 30 days from the date of default as per proclamation No 97/1998 and the 15 days notice of sale from the date of publication in a news paper before which a sale cannot take place, would endanger the sale of the instruments where

the debt for the repayment of which the instruments are pledged mature simultaneously with the instruments pledged.

As it has already been mentioned, with regard to advertisement of sale of business, the practice of banks in this country is not at all sound. For instance, advertisement of sale of business of AIB mentions only few things leaving matters very essential to describe a business aside. The said advertisement of sale[12] does not describe the type or kind of business, the object of the business and all other matters that describe the status and the nature of the business as required under article 155 and the following of the commercial code.

So also, the notice of sale of business of DBE does not adequately describe the business to be sold.

In a civil case, Lule Endale V.DBE, the plaintiff, Lule Endale, sued the defendant, DBE, before the Federal First Instance Court, alleging, among other things, that the defendant having advertised the sale of the plaintiff's business twice which it didn't mortgage at all took it for itself and that the advertisement of the sale of the business wasn't made according to the business mortgage but pursuant to proclamation No 97/1998 that provides for the sale of mortgage of immovable and pledge. The court held, in civil case file No 00463, on June 10, 1995 (EC), that the defendant returns, the business that it has unduly taken, to the plaintiff.

Notice that no sale may take place, without the consent in writing of immovable property mortgagor and/or debtor until at least 30 days after publication of the proclamation of the immovable mortgage. So also, no sale can be undertaken without the consent in writing of the movable property owner and/or the debtor until at least 15 days after publication of the proclamation of sale of the said movable property. The only exception is where the property is subject to decay or is of a kind that should be stored at a cost in excess of its value.[13] The dates are to run from the date when the proclamation of sale appeared in the newspaper that circulate

at the place the property to be sold is situated.[14] Lending banks do also affix the copy of the proclamation on the gate of the house to be sold or the gate of the premises at which the movable is stored and at the place where potential buyers do gather such as government offices, supermarkets, meeting holes, hotels, etc. Some banks also announce the notice of sale on the TV, showing the property to be sold. Here, notice that movable property need not be a pledge, it can even be a vehicle which is not a pledge. Any way, article 406(2) of the civil procedure code, when it stipulates that "when the property is subject to speedy and natural decay it may be sold immediately", it is having a pledge in mind and so as to be in harmony with the laws of pledge embodied in the civil code which we have considered earlier.

To sum up, the notice of sale of different banks that appeared in different newspapers which we mentioned earlier demonstrate the fact that lending bank's practice with respect to duration of notice of sale is in conformity with provisions of the civil procedure code. It has been said that the purpose of the length of time for giving notice is to give prospective bidders sufficient time to be advised of the sale and to decide to bid. [15]

3.2. Sale of Mortgage or Pledge

3.2.1. First auction

In the preceding section, we have seen how notice of sale is proclaimed. We have, also, said that the notice of sale announces the place, date and time of the public auction. On the said date and time, the lending bank's auctioneers and other persons, who are designated amongst the employees of the bank as the members of the committee formed to undertake the public auction, arrive at the place where the auction is to be held. At least two policemen, assigned by the police station situated within the locality of the property to be sold as per the order of the registrar, and two representatives of the nearby kebele administration, assigned by the said kebele

administration officials, arrive to attend the auction according to the arrangement that the lending bank makes beforehand. So also, the debtor and/or mortgagor or pledger or their duly authorized agent will be present at the auction owing to the prior notice of the lending bank.

One of the members of the auction committee registers persons who come to bid and collect from these bidders 25% of the floor price of the property to be auctioned in cash or CPO. This is, of course, a practice that deviates from the provisions of article 440(1) of the civil procedure code which is said to be one of the relevant provisions that, lending banks have to observe. In case of auction of immovable property, it is after the bidder has been declared that he is the winner (purchaser) that he is obliged to pay immediately 25% of the amount of his purchase price money to the auctioneer in the wording of article 440(1) of the civil procedure code.

Lending banks, however, require every potential bidder to deposit 25% of the floor price of the property to be auctioned in advance before the auction. This is a condition precedent since, without such a deposit no potential bidder is permitted to bid to purchase a movable or immovable property. This is not in line with provisions of sale of a movable property by auction due to the fact that it is only incase of sale of immovable property that the winner of the bid (the purchaser) is allowed to settle the purchase price other than the deposit, within 15 days from the date of sale of the immovable in the wordings of article 441 of the civil procedure code. This means that, in case of sale of movable property, there is no legal requirement to deposit 25% of the floor price be it in advance or after the bidder is declared a purchaser. It is after the bidder has been declared the winner that he has to settle the entire price of the sale forthwith, unless agreed otherwise.

Notice also that what potential bidders are required to deposit is not 25% of the purchase price but only 25% of the estimated value of the property to be auctioned due to the fact that the

purchase price is not yet known. What can be said with respect to this issue is that, though the practice of lending banks is not in line with the law, it is not unreasonable because of the fact that where the person, who is declared the winner, disappears or refuses to pay the price of the property auctioned, lending banks, except the remedy provided under article 429 of the civil procedure code do not have any other easy enforcement mechanisms to collect 25% of the price of the property auctioned from such persons.

At the first sale by auction, there may be instances where bidders do not appear or only one bidder appears or bidders bid below the floor price specified in the proclamation of sale. It is only where, at the first sale by auction, the highest bid does not reach the sum equal for the value specified in the proclamation of sale that a second sale shall be held as per art, 428(1) of the civil procedure code or where, at a duly conducted first auction, the person declared "the purchaser" fails to pay the purchase price and the sale is deemed to be cancelled that article 429(1) of the civil procedure code provides that a resale by auction shall be held. Nonetheless, where no bidders appear or only one bidder appears at the first auction as to what such bids could be said and what should be done, the said relevant provisions of the civil procedure code have no clear answer. The said relevant provisions of the civil procedure code do not even expressly mention the number of persons required to bid at the first auction. It is only from the phrase "where no bidders presents himself at the second auction" inserted under article 428 (2) of the civil procedure code, that one may infer that the number of persons required to bid should at least be two even at a second auction in order there be a competitive bid. Therefore, if the presence of at least two bidders is required at the second auction, by analogy, two bidders at least must bid at the first auction in order the first auction be competitive.

The fact that no bidder or one bidder was present at first auction should not result in repeating first auction. This is because, lending banks, so long as they have fulfilled the legal

requirements for first auction, should not repeat first auction indefinitely, whenever bidders fail to appear at this auction. It has been said that where a full and fair opportunity is given to bidders to participate in the sale, the requirement as to competition is fulfilled.[16]

Be this as it may, at the first auction, the auction committee takes a minute that depicts what happened at the auction and report to the concerned officials of the lending bank. The said minute usually states the date, time and place of the auction and also the property auctioned together with its floor price, the name of members of the auction committee including the auctioneer and their responsibilities in the lending bank and at the auction; the name, rank and address of the policemen and the name of the persons registered to bid having deposited 25% of the value of the property to be auctioned; the time the bid has started and ended; the amount every bidder has offered at the bid, the person who offered the highest price and that no bidder thereafter made an offer until the auctioneer very slowly counted three times before the lot is knocked down, that all bidders, except the purchaser, have collected the money they have deposited to participate in the bid. The minute does also state any matter that has happened at the auction and the measure taken. The minute shall be signed by the auction committee members, the debtor and/or the mortgagor or pledger, by persons who come from the kebele administration and the policemen and by the purchaser. Where no bidders or only one bidder appears at the auction or where bidders offer below the floor price, the minute states all such facts.

Here, one thing that has to be mentioned is that, the practice of lending banks with regard to the deposit made by a purchaser in default of payment of the sale price is not in line with the provision of article 442 of the civil procedure code. As per this article, where a purchaser is in default of payment of the sale price of immovable property within 15 days from the date of the sale of the property as stipulated under article 441 of the civil procedure code, the deposit of 25% of the sale price, after defraying the expenses of the sale be forfeited to the government, and the

property shall be resold and the defaulting purchaser shall forfeit all claim to the property or to any part of sum for which it may subsequently be sold.

Notice that where the purchaser defaults in payment of the sale price at the first auction or at the second auction, lending banks should carry out a resale after the issue of a fresh proclamation of sale in the manner and within the time specified under articles 426, 414(2), 423 etc of the civil procedure code which we have thoroughly discussed in the preceding parts of this section.

Lending banks do not transfer the 25% of the sale price deposited by the defaulting purchaser to the government after deducting the expense they incurred due to the sale, they rather forfeit the entire said deposit to themselves.[17] What lending banks forfeit is not only the 25% of the amount of the floor price of the immovable property auctioned but also the 25% of the estimated value of movable property deposited in advance to take part in the bid due to the requirement of lending banks but not due to the requirements of the laws of sale of movable property contained in the civil procedure code.

Lending banks do not also claim, from the defaulting purchaser, any deficiency in price where the property is subsequently sold at a lower price than the price obtained at the cancelled sale due to the purchaser in default as per the wordings of article 429(2) of the civil procedure code.[18] This is, no doubt, against the interest of the mortgager.

Another issue worth of contemplation is that what if lending banks refuse to sell the property for a higher price than the estimated value at first auction and bidders, at the second auction, offer an amount less than the price offered at the first auction? In such circumstances, lending banks should be held liable for the balance since the debtor should not be deprived of his right over the lost opportunity due to the fault of the lending bank.

3.2.2. Second auction

Second auction (sale) should not be confused with resale. Resale is, according to the circumstances of the case, repeating the first auction or the second auction, where the purchaser, at either of these auctions, fails to pay the purchase price without good cause or where the sale is set aside, owing to various reasons. Second auction is to be carried out where the highest bid at the first auction does not reach a sum equal to the value specified in the proclamation of sale of the first auction. A second sale by auction must be held after the issuance of a fresh proclamation of sale in accordance with the rules prescribed under articles 423 cum 428(1) of the civil procedure code.

At the second auction, the property must be sold to the highest bidder even where the said offer is below the estimated value of the property.[19] Where the lending bank rejects the said highest bid which is obtained at the second auction and which is below the up set price, it must transfer the ownership of the property to itself for its value specified in the proclamation of sale. Such measures of lending banks benefit the mortgagor or pledger and should not be considered as good cause to set aside the said measures of the lending bank, in view of the fact that lending banks are not only permitted but also obliged to transfer the ownership of the property to themselves for the value specified in the proclamation of sale where no bidder appears at the second auction in accordance with article 3 of Amendment Proclamation No 216/2000 and article 428 (2) of the civil procedure code.

At this juncture, it is important to note the practice of CBB and AIB, that do bid at the second auction when they themselves exercise power of sale foreclosure despite the provision of article 430(3) of the civil procedure code that stipulates that judgement creditors must obtain the

permission of a court to purchase property under judicial sale foreclosure. It has been learnt that these banks do participate at the second auction fearing that other bidders would purchase the property below its estimated value that may not be sufficient enough to cover the loan they have extended to the borrower. [20]

It should, in connection to public sale, be noted that every sale, be it the first or second auction, shall be stopped if, before the lot is knocked down, the debt and costs of sale are tendered to the auctioneer of the lending bank or proof is given to his satisfaction that the amount of such debt and costs have been paid into any branches of the lending bank.[21]

3.3. Application of the Proceeds of Sale and Disposition of Surplus

If the property is sold at first or second auction, the proceeds of the sale of the property shall be used to settle the principal amount of loan, interest thereon and costs incurred due to the sale within the altered (modified) meaning of article 422(1) of the civil procedure code. If a lending bank realizes security, it must account to the mortgagor or pledger for any surplus, remaining after the debt has been discharged within the meaning of article 422(1) of the civil procedure code and articles 2859(2) and 3105 of the civil code.

If, however, the mortgagor or pledger is the borrower himself and owes to the lending bank other debts, in addition to the loan for which the realized security was mortgaged or pledged, there is no reason that it cannot retain sufficient of the surplus as a set off against these other debts, provided that the lending bank has received no notice of a second and other subsequent mortgage or pledge upon the property sold by public auction and where the said other debts are due and there is no other security cover for such other debts as envisaged under articles 1840 and 1841 of the civil code.

Notice, however, that, where there exists a second degree beneficiary of the mortgage or pledge, the lending bank, that has foreclosed the security, should first secure the consent of the mortgagor or pledger before it pays the surplus to the creditor who enjoys subsequent mortgage. Where such consent of the mortgagor or pledger has already been obtained at the time of the contract of the second mortgage or pledge, the lending bank has to pay the surplus within the meaning and effect of article 192 of the commercial code and articles 2860, 3081 and 3082 of the civil code, unless the mortgagor or pledger obtains an injunction order from a court that suspends such payment. Notice, further, that where a creditor obtains a decree of a court for the entitlement of the surplus, the lending bank that foreclosed the property should effect the payment of the said surplus into the court that passed the decree as per article 415(a) of the civil procedure code. If the proceeds of the sale is not sufficient enough to cover the debt of the borrower, the lending bank can go against the borrower with the view to seeking deficiency judgement that we shall consider under the forthcoming section.

3.4. Resort to the Judiciary after Power of Sale Foreclosure

Mortgagors do frequently resort to the judiciary after a sale in order to set aside the said sale of mortgage whenever they believe that the sale under power is defective.

In a civil case, Lule Endale V. DBE, the plaintiff, Lule Endale, sued DBE, the defendant, before the Federal First Instance Court, alleging that the defendant unduly foreclosed his property. The facts of the case and the arguments of the parties are presented here below.

The plaintiff, having taken a loan amounting to birr 273,402.00 from the defendant and raising over birr 220000.00 from his own source, established metal factory with the total cost of birr 459,992.00 in Gojam, Bichena town. The loan was to be repaid within five years in ten equal semi-annual installments. The security for the loan was the building of the factory in which the

factory business was carried out. The mortgage on the building has been registered by the municipality of the Bichena town. The business, however, has not at all been mortgaged, albeit the fact that the mortgage agreement stipulates merely and only saying that the entire business has been mortgaged.

On top of this, the said business mortgage agreement which was said to be entered into, between the plaintiff and the defendant, prior to the coming into force of Business Mortgage Proclamation No 98/1998, has not been registered by the Awraja Court in the wordings of article 14 of Proclamation No 98/1998 cum article 1175(2) of the commercial code.

While the plaintiff was properly servicing his debt periodically, in accordance with the loan repayment schedule, fire broke out and damaged one of the key machineries of the factory that resulted in the entire closure of the factory due to the fact that, in the absence of the damaged machinery, the factory cannot be functional. The cost of the damaged machinery was only birr 9000.00 and has been collected by the defendant from Nyala Insurance Company after agreeing that it shall use the said compensation of birr 9000.00 solely to replace the damaged property. The defendant, however, used the compensation for a repayment of the loan in spite of the fact that the plaintiff owes over birr 200000.00 outstanding loan to the defendant as at the date of the fire accident. Therefore, as the damaged machinery was not replaced, the plaintiff could not produce and sell products and pay his debts periodically as originally planned by both the plaintiff and the defendant.

The defendant, pursuant to proclamation No 97/1998, having re-estimated the value of the building and the business for birr 250000.00, which it has estimated at the time of the contract of loan and mortgage of the building for birr 459, 992 and having given to the plaintiff a 30 days notice of intention to foreclose and having auctioned the properties twice, took the said properties itself since no bidder appeared at both the first and the second auction.

Some of the machineries that were auctioned twice and subsequently transferred to the defendant do not belong to the metal factory for which the defendant extended the loan that is said to be in default. The said machineries were rather part of another business whose loan was settled years ago. The defendant has released these machineries expressly confirming, in writing, that the loan has entirely been settled. The plaintiff, in his statement of claim, prayed that the transfer of his property to the defendant be set aside and the property be returned to him and that the defendant be held liable for damage and costs he has incurred due to the closure of his business and the law suit.

The defendant, in its statement of defense that it has submitted to the court, having admitted all the facts stated in the plaintiff's statement of claim, contended that it has not committed any fault since the insurance compensation must be used for the settlement of the loan that the defendant has extended to the plaintiff as per the wordings of article 3069 of the civil code and that the machineries of the factory are intrinsic elements of the building that the plaintiff has mortgaged with the defendant. The defendant, furthermore, stated that the auctions are proper and the transfer of the plaintiff's property to itself is lawful in the eyes of articles 396-449 of the civil procedure code and articles 3 and 4 of proclamation No 97/1998 in view of the fact that the plaintiff has failed to service his debts as per the loan agreement he signed.

The court, in file No 00643, on Sene 26, 1995, held that the defendant return the entire property that it has transferred to itself to the plaintiff and that the right of the plaintiff to claim damage and costs is preserved on the ground that the cause for the default of the plaintiff is the defendant itself since it has failed to replace the damaged machinery with the compensation it has collected from the insurer and that the defendant has no right of mortgage over the business of the plaintiff since the said mortgage agreement has not been made as per the relevant provisions of the commercial code.

The decision of the court is correct in view of the facts and arguments presented by the parties. The defendant should not be allowed to foreclose the business that it has mortgaged without expressly stating, every element of the business mortgaged as per article 178(2), 179 and 191(2) of the commercial code. This is because, business mortgage in Ethiopia is a kind of a limited scope charge modeled after continental or Germanic system unlike Anglo - American Universal floating charge.[22] Elements of a business and intrinsic elements of immovable, should not be taken as one and the same. Intrinsic elements are part and parcel of a building where as portable (movable) machines and equipment are not parts of a building but are tangible elements of a business. On top of these, the business mortgaged should not have been proclaimed to be sold before it was repaired and reinstated to its previous position, the employees of the business should not have been terminated and the customers disbanded. The compensation should have been utilized for the replacement of the damaged machinery. The defendant should have, in addition to the relevant provisions of laws of insurance contained in the commercial code, observed that article 3071 of the civil code could be invoked in order it applies by analogy where movable properties are also damaged. Besides, the said business mortgage has not even been registered by the Awraja Court, it was rather registered by the municipality which is only in charge of immovable mortgage registration. The business had been advertised for sale pursuant to proclamation No 97/1998 relevant for immovable property only. For all these practical reasons, the above mentioned decision of the court is in line with article 419, 446, etc of the civil procedure code.

In another civil case, CBB V. W/o Menberu Assefu, the applicant, CBB, petitioned before the Federal Supreme Court Cassation Bench, so as the order of the Oromiya Supreme Court and the decisions of the lower court (High Court) be reversed.

As the facts of the case depict, the plaintiff before the Bonga High court, sued the now respondent, the then defendant, CBB, for the following reasons. The defendant, having re-estimated the value of her hotel building and business and proclaimed public sale of same and participated at the second auction with its partner Commercial Nominee Company has purchased her building for birr 475,381.87. The plaintiff prayed that the court decide in order the defendant transfer her property to itself for the value of the property that the defendant itself has re-estimated and caused to be specified in the proclamation of sale.

The defendant contended that: 1. the court has no jurisdiction to entertain the case or to decide that the defendant transfer the property to itself except deciding that the defendant pay compensation if the plaintiff proves that she has sustained damage due to only the defendant's violation of the relevant provisions of the civil procedure code articles 394-449, in the process of selling by auction as envisaged under articles 6 and 7 of proclamation No 97/1998.

The High Court held that the defendant should transfer the property to itself for the value specified in the proclamation of sale. It is from this decision that the defendant lodged its appeal to the Oromiya Supreme Court. The Oromiya Supreme Court dismissed the case for lack of jurisdiction of a cassation proceeding over the case. And the appellant filed its petition before the Federal Supreme Court, Cassation Bench in order the decision of the High Court and the order of the Supreme Court be reversed on the grounds of almost identical points of argument it has presented to the trial court.

The Federal Supreme Court, Cassation Bench, in civil case file No 9698, on Tikimt 24, 1996 E.C, reversed the decision of the High Court stating that courts cannot order a lending bank so as it transfer the property to itself. If the respondent has sustained damage, she has a right to bring a law suit against the appellant with the view to seeking compensation as clearly provided under article 6 of proclamation No 97/1998.

With due respect, both the decisions of the High court and the Federal Supreme Court, Cassation Bench are erroneous. The High Court had no legal basis that enables it to decide that the lending bank transfer the property to itself except setting the sale aside where the lending bank participates in the auction in violation of article 430(1) and (3) of the civil procedure code which is said to be relevant and be observed by lending banks as clearly envisaged under articles 6 and 7 of proclamations No 97/1998 and 98/1998.

The decision of the Federal Supreme Court, Cassation Bench is astonishing in view of article 5 of proclamation No 97/1998 and article 15 of proclamation No 98/1998 which, under the title "the relationship between the bank and the debtor", do provide, in identical manner, that the sale made by the lending bank shall be deemed to have been executed on behalf of the debtor together with the meaning of article 430(1) and (3) of the civil procedure code.

A lending bank, which is deemed to be the agent of borrowers and/or mortgagors or pledgers, should, in no way, be permitted to purchase the property that whose value it has re-estimated, that it has notified its sale, in its own way and standard of description and mode of notice of sale, that where itself is the auctioneer, even where it is allowed to alter or modify provisions of the civil code that are said to be relevant let alone where it is not expressly allowed as is in the real case.

The legal system of Ethiopia does not, at all, allow a person to be a seller and a buyer at the same time in a single transaction.[23] It does not also allow an agent to purchase the property of its principal unless the principal consents as it is expressly enunciated under article 2188 of the civil code. It has been said that a mortgagee bank with power to sell, is not, in the absence of agreement or statutory provisions to the contrary, allowed to bid or purchase directly at his own sale.[24]

Thus, the judiciary should not close its eyes and refuse to observe the undue practice of lending banks, for instance, where they purchase the property of debtors or mortgagors by participating in a bid where they themselves are auctioneers, etc, owing merely to the provisions of articles 6 and 7 of proclamation No 97/1998 and articles 16 and 17 of proclamation No 97/1998 that provide that any law which is inconsistent with this proclamation shall be in applicable.

It should be noted, that unless the judiciary closely observes and controls the exercise of power of sale foreclosure of lending banks, the outcome of the power of sale of these banks would be of far reaching consequences. For instance, there maybe instances where a company owes a debt to several banks, many suppliers, to the public at large owing to its issuance of several classes of shares. Say one of the lending banks has a first degree mortgage over the assets of the debtor company over which other banks enjoy subsequent mortgage and over which still other creditors which are not engaged in banking activities enjoy junior mortgagee's status and suppliers and the public are unsecured creditors. Assume, further, that creditors intend to file bankruptcy petition with a view to transferring the management of the debtor company to a qualified trustee in bankruptcy in order the trustee pull out the said debtor company from trouble and makes it competitive and pay its debts to all class of creditors. The first degree mortgagee bank, as soon as it hears of the rumor, intends to foreclose the assets of the company and the matter is brought to the judiciary. If the judiciary, disregarding the provisions of articles 1019, 1025(1) and the following of the commercial code, decides that it has no jurisdiction or that the creditors can sue the first degree mortgagee bank after it has undertaken the sale and where the creditors prove that they have sustained damage owing to the failure of the bank to observe the relevant provisions of the civil procedure code (articles 394-449), business, that require the

pulling of resources of whatever kind and contributed by whomever, would fail to enjoy such kind of support that comes from various economic units and the public at large.

It should be noted that the validity of power of sale foreclosure can be challenged even in countries where power of sale foreclosure has widely been practiced since long ago. In USA, for instance, there are three remedies available to challenge the validity of a power of sale foreclosure. These are: 1) an injunction suit against pending foreclosure; 2)a suit to set aside a sale; 3) an action for damages against the foreclosing mortgagee or trustee.[25]

The close reading of the provisions of the civil procedure code, articles 394-449, would enable us to conclude that the rules prescribed under these provisions of the civil procedure code which are said to be relevant to govern power of sale foreclosure in Ethiopia are more or less similar with that of the practice in the USA. It is because, under Ethiopian law, too, there are, at least, three grounds where a sale of immovable property can be set aside. These are: where the judgement debtor (the mortgagor) has no saleable interest in the property,[26] where another person has an interest in the property,[27] and where there is material irregularity or fraud in the conduct of the sale resulting in substantial injury to the applicant.[28] The application to set aside on the ground of material irregularity or fraud that has resulted in substantial injury, may be made by the mortgagor or junior mortgagees, or any other person whose interests are affected by the sale.[29] Notice, however, that no irregularity in publishing or conducting the sale of movable property shall vitiate the sale, but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute against him for compensation or, if such other person is the purchaser, for the recovery of the specific property and for compensation in default of such recovery.[30]

Here, notice that not only are debtors and/or mortgagors or pledgers who may resort to the judiciary, in order to have the sale set aside or to be compensated where the sale price is

inadequate but also the purchaser where the mortgagor has no saleable interest in the property sold, that is to say, the mortgagee bank has no valid mortgage over the property sold within the meaning of article 446 of the civil procedure code. The lending bank, where the property sold is not sufficient to cover the loan, can go against the borrower for a deficiency judgement if the said borrower has other assets.

Where the mortgager or pledger is a person who has mortgaged or pledged his property to secure the debt of the borrower (another person), he shall not be liable for a deficiency judgement unless he has agreed to this effect within the meaning of articles 3105 and 2859 etc of the civil code.

3.5. Delivery of the Property Sold to the Purchaser or Transferring Ownership of Same to the Foreclosing Bank

In case of immovable property (mortgage), where application is not made within two months from the date of sale, to set aside the sale or the transfer of ownership of the property to the foreclosing bank, on the ground of material irregularity or fraud or lack of saleable interest or another person has an interest in the property or any such application is made but it is disallowed, the sale or the transfer of ownership of property to the foreclosing bank under power shall become absolute with in the modified meaning of the provisions of articles 444-447 of the civil procedure code.

The practice of lending banks is that they do not wait for two months from the date of sale to deliver the property to the purchaser or to take the possession of the property where it is not sold at the 2nd auction and whereby they are obliged to take it themselves. As it has been mentioned earlier, a lending bank that exercises a power of sale foreclosure possesses not only a movable but also immovable mortgage prior to the public sale. Thus, what lending banks do after

duration of power of sale foreclosure can only be understood from the provisions regarding mortgage or pledge contained in the above mentioned codes.

Moreover, these laws of power of sale foreclosure merely cross-refer to articles 394-449 of the civil procedure code so as the foreclosing banks be guided by them without even pointing out the relevant provisions amongst them. The said cross referred provisions of the civil procedure code, even where they seem relevant, cannot easily suit the purpose of lending banks without some alteration or modification. The degree or extent of modification results in injustice on the debtors, subsequent mortgagees and other unsecured creditors. In this regard, it can be said that the laws of power of sale foreclosure are incomplete, bones without flesh.

5. Among the recently proclaimed laws of power of sale foreclosure, proclamation No 97/1998, which is said to be "A Proclamation To Provide For Property Mortgaged Or Pledged With Banks", since it provides some rules on sale of pledge, it collides with the properly crafted laws of pledge contained in the civil code, let alone to be serving its purpose as an alternative to judicial enforcement of securities. As our investigation has made it clear, because of the nature of pledges and the nature of the obligation secured by pledges, it is impossible to give a 30 days prior notice of intention to foreclose and to issue a 15 days long proclamation of sale in case of pledge. Therefore, it is difficult to be guided by the rules of civil procedure code which are said to be relevant to foreclose a pledge. The legislator, when it employed the term "pledge" in this proclamation, wanted it to mean, perhaps, "movable properties" like vehicles without fully understanding what "pledge" really means.

6. The recently proclaimed laws would enable banks to cause injustice not only on borrowers and/or mortgagers but also on any secured creditors that are not banks and any unsecured creditors including banks themselves because lending banks, instead of giving a business a chance to be managed by trustees, in order it be profitable, in accordance with the bankruptcy

law embodied in our commercial code, mostly foreclose them. Though the commercial code has got several types of remedies that enable a business to rehabilitate where it fails to repay its loan due to temporary problems, there is no provision in the recently proclaimed laws of power of sale foreclosure that prevent lending banks to exercise their power of sale where creditors of a company or any other borrower engaged in commercial activity intends to give a chance for such rehabilitation.

7. The practices of lending banks with respect to power of sale has been found to be problematic not only, due to the incomplete and vague nature of the laws of power of sale foreclosure but also due to their own weaknesses such as lack of adequate knowledge of prudent lending, in particular, and principles and practices of banking business in general. On top of these, lending banks, owing to various loopholes of the said laws have availed, do re-estimate, themselves, the value of the property to be auctioned, bid at auction and dispossess immovable and business mortgage prior to the public sale going against the clear provisions of relevant laws of the civil procedure code.

8. We have seen that how the Federal Supreme Court, Cassation Bench, the highest organ of the judiciary, is reluctant to set aside a sale held under power in violation of the relevant laws.

9. The research has also made clear that the recent laws of power of sale did not enable lending banks either to curb the flow of cases, in connection to loan collection, to courts or to stamp out or significantly reduce their non performing assets. The said laws rather have become a cause for traders and investors to retreat from banks owing to fear of the exercise of power of sale of lending banks.

The writer of this thesis, therefore, recommends, in order the under mentioned measures, that involve both legal and non-legal aspects, be taken by those concerned bodies with no further delay.

Of all the parties concerned, banks, operating in this country, should strive to transform the traditional and fragmented economy into modern and big economy. In order the said transformation takes place, through uninterrupted process, banks should be vanguard to play an exemplary role such as the following.

Bankers should commit themselves to principles of prudent lending in order, not only, to protect their assets from losses but also in order their wealth increase and their bank achieve growth, the standard of which enables it play a significant role in the national economy. The said prudent lending should include lending a limited amount of money to an individual traders such as in the United Kingdom[1] which is not greater than 75000.00 pound. Lending money worth in million to individuals is not the hallmark of a bank committed to principles of prudent lending. Banks should note the fact that, however capable an individual human being may be, he is mortal and his said ability is limited and his equity capital is minimal particularly in Ethiopia where accumulation of private capital was prohibited by law during the command economy. For instance, in India, development banks used to lend long term investment loan capital to public share companies only. It is only after 1971 that they are allowed by law to extend investment loan capital to well capitalized and managed private limited companies. They do not however extend loans to individual human beings (sole properties). [2]

Our banks should learn from Indian bank's practice with respect to investment finance in view of the fact that, in Ethiopia, it is mainly investment loans that are usually in default owing to shortness of repayment period and the big amount of the loan granted to sole proprietors or undercapitalized private limited companies. The granting of investment loans to public share companies or working together with public share companies has numerous advantages: public share companies, unless dissolved for good cause, have perpetual existence. In this regard, it has been said that: [3]

the sale is that they simply deliver the property to the purchaser and write a letter to the concerned municipality so as the municipality transfers the ownership of the property sold to the purchaser, and where the property sold is a vehicle, they write the said letter to the concerned road and transport bureau and where the property sold is a business to the concerned trade, industry and tourism bureau. Where the property has not been sold and the lending banks are obliged to transfer the ownership to themselves, they do not transfer the ownership to themselves, unless they determine to make such property part of their assets permanently. They auction it several times to get the highest price that would cover their loan amount or where they fail to sell it after several attempts, they even give it to anybody in the form of donation. Where, however, they intend to make it part of their asset they write a letter to the concerned government organ in order the ownership be transferred to themselves.[31]

Where the property is sold, lending banks set off the debt of the borrower against the price for which the property is sold or where the property has not been sold at the 2nd auction and taken over by the lending bank against its estimated value specified in the sale proclamation.[32]

Before leaving this chapter, the writer of this thesis would like to mention the fact that the recently proclaimed laws of power of sale foreclosure neither enabled banks to collect their loans efficiently nor promoted a good business culture as originally intended, though it is indisputable that they have collected a good amount of their loan either in cash or in kind by taking over the property not sold at the second auction.

It should however be noted that at least some of the lending banks, be it before or after the power of sale, are obliged to go to court to respond to the law suits brought against them. On top of this, they do frequently resort to the judiciary for a deficiency judgement since the collateral disposed of under their power of sale does not cover their loan amount. For instance,

the number of pending cases of DBE before courts and the number of cases under its foreclosure units are almost equal.[33]

The number of properties that some banks have taken over where they are not sold at second auctions is large. Since such properties are not easily realizable, lending banks do incur cost for their protection and preservation. There are even instances where lending banks donate such properties situated in rural areas to persons other than the debtor.[34]

Ato Gezahegn Yilma, the president of the CBE, in his speech he made at the meeting of business community held at Sheraton Addis on February 30, 2005, stated that although banks have pressurized the legislator to enact the recent laws of power of sale foreclosure, the coming into force of these laws, however, did not at all support the loan collection efforts of CBE. The measures the bank has taken in accordance with the laws of power of sale foreclosure have made many potential investors and borrowers and mortgagors hesitant to use the services of the bank and hence the bank, hereafter, will not as such prefer power of sale foreclosure as an alternative to enforce its security.[35]

> "A share company is a suitable form of business organization. Its life does not depend upon the death, insolvency or retirement of any or all shareholder(s) or director(s). Members may come and go but the company can go on forever. During the war of World War II, all the members of one company, while in general meeting, were killed by a bomb. But the company survived; not even a hydrogen bomb could have destroyed it".

The public share company is the most suitable form of business organization to comprise an unlimited number of shareholders and capital, hence, enable a given country to mobilize resources from citizens or organizations of any country with the view to engaging in a meaningful industrial, agricultural or service sector managed by professional executives.

Studies in economic and social history in general and the growth of big businesses in the United States and western Europe in particular reveals that: [4]

> "the businesses that are undertaken by companies can be distinguished from traditional enterprises by virtue of their size. Companies employ for larger capital assets and greatly expanded work force. These companies also tend to employ more of their assets in the form of fixed capital, rather than working capital.
>
> Such companies usually embody an integration of potentially separate processes or plants. Horizontal integration joined similar or identical firms. Vertical integration amalgamates different stages in a manufacturing process, between raw material acquisition and final product sale commonly able to reduce unit costs thus achieving economies of scale.
>
> Companies are able to diversify into new product lines, and often characterized by their commitment to continuing programs of scientific research development in order to develop and refine new products.
>
> It is companies that oftenly grow rapidly introducing expensive new technology, the financial burden often exceeded the funds that could be generated from retained profit. In some cases, capital was raised in stock markets due to which the equity in large companies come to be increasingly diffused amongst large number of share holders; ownership in such companies was no longer commonly represented by intimate groups of entrepreneurs or family members, but by seemingly anonymous bodies of millions of individual and institutional investors such as insurance companies and pension funds.
>
> The growing size, complexity and geographical spread of modern and big businesses of companies enable the introduction of novel and increasingly sophisticated forms of management. Consequently there evolved a new class of salaried executives organized in hierarchies of upper, middle and lower management which resulted in the divorce ownership and control of a company unlike the small firms to be managed by their owners, perhaps assisted by few foremen or clerical

> staff. And it is thus a fundamental shift forms a system of proprietorial capitalism to managerial capitalism or sometimes termed as peoples' capitalism."

Our banks, therefore, should learn a lot from western countries' experiences indicated in the before-mentioned quotations and develop an interest to invest in equity shares. Our banks should, insofar as they grant investment loans after an appraisal, at least, be able to convert their loans in to equity shares and take over the management of the firm where the borrower defaults in order the firm revitalizes as the experience of banks in the United Kingdom and India.[5]

Investors and/or borrower's in this country, should be cognizant of the fact that an individual effort is full of limitation and learn to work jointly by way of pulling resources of what ever kind under a public share company instead of establishing similar businesses here and there and engage in unhealthy competition. They should also learn that their joint effort would enable them get relieved from being burdened by bank loan that lead their business to default and foreclosure before their businesses even commence their operation. They should be honest and commit themselves to the values of genuine trades and engage in meaningful economic activities in order their country and themselves benefit from their investment endeavors. In this regard, our investors have to take the sincere advice of professor Escara,[6] the drafter of our commercial code, which he gave four decades ago and quoted here below:

> "At present, Ethiopian capitalists (those with sufficient income so that they can invest part) do not appeal to be actively interested in the industrialization of the country, with the result that foreigners have taken the initiative in this field, which is not normal. National investments are made, primarily, in land, in animals, and in construction of houses for renting, one does not subscribe voluntarily- and for good reason- to the shares of companies. If the would be commercial code regulates the share company with simple and clear rules which would protect national savings, one would see a day where there would be numerous share companies owned solely by Ethiopians or by Ethiopians with some participation of foreign capital. Thus, Ethiopians will acquire pre-eminence in their own economy, will interest themselves in the

> industrial expansion of the country (which must accompany agricultural expansion), will enlarge the amount of their investments, and will create a national saving of transferable securities, which is a condition of all lasting economic development"

The government has an important role to play through its organs:- the legislator, and the judiciary. The judiciary, at least, until the legislator enact a fresh law that would properly govern a power of sale foreclosure, should interpret the relevant provisions of the civil procedure code and protect debtors from the consequences of undue practices of banks. The legislator should not close its eyes where debtors desperately seek its support that halt the undue practices of banks and the judiciary which we have already considered thoroughly and hence it is high time for the legislator to review the recently proclaimed laws of power of sale foreclosure (proclamation No 97/1998 including the amended one and proclamation No 98/1998) and enact a fresh law capable of protecting the interests of all classes of creditors and debtors.

As it has already been pointed out earlier, it is difficult to exercise power of sale in accordance with the two proclamations without causing injustice on debtors and unsecured creditors and even junior mortgagors or pledgers due to the nature of the cross referred provisions of the civil procedure code. The very nature of the cross referred provisions of the civil procedure code does not suitably fit the purpose of sell under power as they are crafted to guide litigant parties in the course of judicial proceedings and the courts, in order they be able to resolve the litigation of litigant parties. Identifying the relevant provisions is difficult for the debtors, the foreclosing banks and even for the courts. Even where they attempt to identify the said relevant provisions, it would again be difficult to employ them without alteration or modification. The alterations, in turn, result in injustice.

A fresh law of power of sale foreclosure has to, therefore, be enacted after a thorough investigation of the rich experiences of other countries elsewhere in the world. The would be

enacted law should not be applicable to pledge as the sale of pledge under power has already been beautifully governed by the civil code. The would be law should also clearly respect the mode of security enforcement incase of bankruptcy proceedings embodied in the commercial code. Moreover, the said would be law should destine a mechanism whereby the sale under power be confirmed by a court of law.

On top these, a separate stay law should be enacted with the view to granting a sufficient grace period to debtors to enable them pay their debts where draught, war, economic crises etc obstruct loan repayment. The stay law should be able to suspend not only power of sale but also delay execution on the debtor's property under judicial foreclosure and set a minimum value below which property can not be forcibly sold to satisfy a debt like that of the practice in the United States of America.[7]

The legislator should also include sufficient provisions in the banking laws that make lending banks responsible to their own loans and liable to the equity of borrowers where they intentionally or negligently provide their customers with wrong advises that lead customers to losses like the laws and practices in the United States of America.[8]

It is only the joint efforts of the government, traders (investors) and banks that would alleviate problems surrounding loans in default and non performing assets of banks. The issuance of defective laws of power of sale foreclosure alone will not discipline borrowers to repay their loan and avoid lengthy judicial sale foreclosure as the preambles of the recent laws of power of sale foreclosure do herald.

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Interview with Endakimew Kebede, *Head, Litigation Section, Commercial Bank of Ethiopia*

Interview with Haileselassie Kahsaye, *Owner of Hawzen Hotel.*

Interview with Ato Tesfa Woldekidan, *Head, Research and Resource Mobilization Department. Development Bank of Ethiopia*

CONSTRUCTION AND BUSINESS BANK

CONTRACT OF TERM LOAN

This contract is made and entered into this _____day of ____20____ between _____ (Spouse)*_____

Resident_____ City
Woreda_____ Kebele_____
House No._____ Tel. No._____
P.O.Box_____ID/License No.
_____.

Resident_____ City
Woreda _____Kebele_____
House No._____Tel. No._____
P.O.BOx_____ ID/License No.
_____

(hereinafter called " the Borrower/s") and the construction and business Bank (hereinafter called " the Bank") upon the terms and conditions herein contained.

I. TERMS AND CONDITIONS OF THE CREDIT

1. a) The Bank grants to the Borrower/s a loan of Birr _____) (_____Birr), receipt of which is hereby acknowledged by the borrower/s.

   b) The Borrower/s hereby agree/s that if the loan granted is for the purpose of equipment/ merchandise, the payment shall directly be made to the supplier of such goods.

2. The Borrower/s shall jointly and severally repay the amount of the loan granted together with interest, expenses and all costs on or before the _____ day of _____20____ as hereinafter provided. The repayment shall be birr_____) (_____ Birr) per _____ and payment will be made at the Bank's _____ Branch starting on _____ day of _____ 20_____ to be continued uninterruptedly until the whole debt is fully settled.

3. The loan granted shall be applied to or utilized exclusively for the purpose of _____
   _____
   _____.

- Does not apply to business loan

4. a) Amounts so advanced or debited to the loan account together with costs and expenses assumed by the Bank shall bear interest at the rate of _____ percent (_____%) per annum calculated on daily balances and repayable on the last day of each month. The rate of interest indicated in the contract may vary from time to time according to the interest rate directives or regulations to be issued by the National Bank of Ethiopia of or by the decisions of the Bank. Hence, the interest rate to be issued by the National Bank of Ethiopia or by the Bank will replace, as of the date of such change, the interest rate in this contract. If the new interest exceeds the one indicated in this contract, the Bank at its discretion may either extend repayment period or increase monthly repayment.

   b) Should the Borrower/s fail/s to utilize the advance made for the purpose mentioned in this contract or fail/s to pay any installment of the principal due or violate any clause of this agreement a penalty rate of _____ percent (_____%) per annum will be applied from the date of default in addition to the rate of interest provided for under Article 4(a) herein-above.

5. Any payment made by the Borrower/s shall first be applied to settlement of costs and expenses assumed by the Bank, then to payment of interest due and then to the principal.

6. Should the Bank demand, the Borrower/s at any time will make and sign negotiable promissory notes payable to the Bank for the amount or amounts due under this loan. The issue of such promissory note shall not be construed as a notation of the loan contracted hereunder. All expenses for the issuing of such promissory notes should be borne by the Borrower/s.

II. PLEDGE OR MORTGAGE OF PROPERTIES

The Borrower/s has/have hereby pledged/mortgaged buildings/vehicles/negotiable instruments/merchandise/business or such other items which may be evidenced by list or lists attached to this contract as security for the performance of the obligations of the borrower/s in this contract.

N.B: - The type of security that is not applicable should be cancelled by writing across the appropriate space the words NOT APPLICABLE.

DESCRIPTION OF SECURITIES

A. DESCRIPTION OF BUILDINGS/HOUSES

OWNER'S NAME	TITLE DEED NO.	CERTIFICATE NO.	CITY/TOWN	WOR.	KEB.	ESTIMATED VALUE AT THE TIME OR MORTGAGE

B. DESCRIPTION OF VEHICLES

OWNER'S NAME	TYPE OF VEHICLE & MODEL	PLATE NO.	ENGINE NO.	CHASSIS NO.	BOOK NO.	ESTIMATED VALUE AT THE TIME OF MORTGAGE

C. DESCRIPTION OF NEGOTIABLE INSTRUMENT

TYPES OF NEGOTIABLE INSTRUMENT	QTY.	VALUE IN BIRR		REMARKS

D. DESCRIPTION OF MERCHANDISE

ITEMIZED LIST OF MERCHANDISE	QTY.	COST/MARKET PRICE		MARKS	STORED AT

E. BUSINESS MORTGAGE

NAME OF BUSINESS	THE NAME OF THE BRANCH IF ANY	OWNER'S NAME	OBJECTS OF BUSINESS	LICE. NO.	CITY/TOWN	WOR.	KEB.	BUIL. NO.

8. a) The details of machinaries and equipment of the business mortgaged is evidenced by the attached list for the loan granted under this contract. An all future acquisitions of any type of property by the mortgaged business shall be deemed pledged or mortgaged as additional security for the debt incurred as per this contract.

b) The pledge or mortgage shall likewise apply to the intrinsic elements, accessories and appurtenances of the said properties as well as to the incorporeal elements of the business mortgaged.

9. In pursuance of this contract the Borrower/s agree/s to deliver into the possession (direct or indirect) of the Bank the merchandise/title certificate/negotiable instruments (commercial instruments, transferable securities, documents of title to goods).

10. The Borrower/s in respect of the property pledged/mortgaged warrant(s) and affirm(s) that: -

a) They/he/she/it is/are/ the owner/s of the properties pledged/mortgaged.

b) They/he/she/it have/has good and lawful title to the property.

c) They/he/she/it are/ is the lawful possessors/s of the properties mortgaged and that sane is/are free from any encumbrances whether judicial, legal or contractual except for securing debts pertaining to this contract.

11. The Bank by itself may insure the mortgaged properties against loss or damage by fire or any other forms of risk and renew same at the expense of the borrower/s. Under such policy of instruments the Bank will be the first beneficiary. Any outlays assumed by the Bank to insure the mortgage and/or to renew the policy shall be debited to the loan account and be repaid by the borrower/s with the interest rate specifies herein until the debt is fully settled.

12. The total value of the pledged merchandise/instruments shall always be at least higher by_____ percent (____%) than the amount of the loan granted.

13. In the event the selling price of the merchandise pledged drop below the cost price, the Borrower/s shall deliver from time to time into the possession (direct or indirect) of the Bank other merchandise acceptable to the Bank and of sufficient market value so as to maintain the total value of the merchandise pledged at a sum not less than the amount of the loan plus agreed margin. Such additional list of merchandise shall be deemed part of the contract.

14. For the purpose of determining compliance with the provisions hereof, the Bank may at any time inspect, visit or check the conditions and status of the business and all the properties given as security for the performance of the obligation under this contract.

15. The Borrower/s undertake to keep and to maintain the said properties in a state of good conditions and repair.

b) The pledge or mortgage shall likewise apply to the intrinsic elements, accessories and appurtenances of the said properties as well as to the incorporeal elements of the business mortgaged.

9. In pursuance of this contract the Borrower/s agree/s to deliver into the possession (direct or indirect) of the Bank the merchandise/title certificate/negotiable instruments (commercial instruments, transferable securities, documents of title to goods).

10. The Borrower/s in respect of the property pledged/mortgaged warrant(s) and affirm(s) that: -

a) They/he/she/it is/are/ the owner/s of the properties pledged/mortgaged.

b) They/he/she/it have/has good and lawful title to the property.

c) They/he/she/it are/ is the lawful possessors/s of the properties mortgaged and that sane is/are free from any encumbrances whether judicial, legal or contractual except for securing debts pertaining to this contract.

11. The Bank by itself may insure the mortgaged properties against loss or damage by fire or any other forms of risk and renew same at the expense of the borrower/s. Under such policy of instruments the Bank will be the first beneficiary. Any outlays assumed by the Bank to insure the mortgage and/or to renew the policy shall be debited to the loan account and be repaid by the borrower/s with the interest rate specifies herein until the debt is fully settled.

12. The total value of the pledged merchandise/instruments shall always be at least higher by_____ percent (____%) than the amount of the loan granted.

13. In the event the selling price of the merchandise pledged drop below the cost price, the Borrower/s shall deliver from time to time into the possession (direct or indirect) of the Bank other merchandise acceptable to the Bank and of sufficient market value so as to maintain the total value of the merchandise pledged at a sum not less than the amount of the loan plus agreed margin. Such additional list of merchandise shall be deemed part of the contract.

14. For the purpose of determining compliance with the provisions hereof, the Bank may at any time inspect, visit or check the conditions and status of the business and all the properties given as security for the performance of the obligation under this contract.

15. The Borrower/s undertake to keep and to maintain the said properties in a state of good conditions and repair.

16. The Borrower/s agreed that compensation arising out of the expropriation of the mortgaged property or any part thereof should be paid to the Bank for the reduction or settlement of any indebtedness under this contract.

III TERMINATION OR CANCELLATION

17. The whole or any part of the loan advanced herein including interest accrued and any costs and expenses arising out of this agreement, shall become immediately due and payable if:-

a) The Borrower/s fail/s to utilize the loan arising out of this agreement for the purpose it is advanced to.
b) There be default in the payment of any installment of the principal.
c) There be default in the payment of two consecutive installments of interest together representing 10% (ten percent) of the amount of the loan.
d) There be the death, interdiction, bankruptcy or insolvency of the Borrower/s.
e) There be violation of any clause of this agreement by the Borrower/s.

18. The Borrower/s hereby authorize/s the Bank to sell the mortgage /pledged property by auction upon giving a 30 days prior notice to him/her/it/them and to transfer the ownership of the property mortgaged/pledged to the buyer if he/she/it/they fail/s to pay the whole or any part of the loan advanced with interest accrued including any costs and expenses, related to this agreement as provided in Article 17 of this agreement.

19. In the event of failure of the Borrower/s to discharge the obligations assumed herein with interest or any part thereof, or any costs and expenses as provided hereby, the Bank shall have the right to reimburse itself from any and all sums which the Borrower/s must have on deposit or other-wise with the Bank or in any Bank or financial institutions. Thus, the Borrower/s give/s an irrevocable authority to any Bank or financial institutions. Thus, the Borrower/s give/s an irrevocable authority to any Bank or financial institutions. Thus, the Borrower/s give/s an irrevocable authority to any Bank or financial institutions to accept any request of the Bank for reimbursement of the loan from any funds which he/she/they/it/may have on deposit or otherwise.

20. The Borrower/s agree/s to pay 5% service sales tax on the interest to be calculated as stipulated in this contract on the monthly accrued interest and is payable, after being added to the monthly repayment, on the loan repayment date. If such tax is

not paid on such date together with the loan repayment, it should be added on the debt and bear interest at the rate prescribed in the contract. Should the authority change the rate of tax, then the new rate will replace the one in this contract as of the date of such change.

21. The parties hereto have expressly agreed that there shall be no period of grace for carrying out the obligations of the Borrower/s under this contract.

22. All costs relating to stamp duty, registration fee, insurance premium, or any other related expenses arising out of the execution and recordation or extingushment of this contract or otherwise arising hereunder shall be borne by the Borrower/s.

In witness whereof the parties hereto have signed this contract on the day and year first above written.

_____	_____	_____
Bank	Borrower/s	The Spouse of the Borrower

Witness: 1. _____
2. _____
3. _____

Construction and Business Bank
Loan Contract

This Contract is made and entered into this _____ day of _____20_____ between _____

Resident in _____ City
Woreda_____Kebele_____
Tel._____P.O.Box_____
House No._____
Licence /ID No._____

(spouse_____
Resident in_____city
Woreda_____Kebele_____
House No._____
Tel._____P.O.Box_____
Licence /ID No._____

(herein after called " the Borrower/s") and the Construction and Business Bank (herein after called " the Bank")

Wherein the parties mutually agreed, as follows:-

Art. 1. The Bank has agreed to grant in lump sum or phase by phase to the Borrower/s advances up to the total sum of birr_____(_____ _____birr) repayable jointly and severally by the Borrower/s with costs, interest and expenses on or before_____day of _____ 20_____.

Art. 2. The sums so advanced to the Borrower/s shall be applied to or utilized exclusively for the purpose of _____ which has proper authorization from_____.

Art. 3. a) The Borrower/s agree/s that the advances will be effected to him/her/it/them from time to time after the progress of the project intended is evaluated by the Bank.

b) With the first advance under this agreement the Borrower/s undertake/s forthwith to commence the implementation of the said purpose for which advances hereunder are contracted.

c) The Borrower/s agree/s that second and further advances shall only be made after detailed statement of the work performed and value thereof is submitted to the Bank and after the Bank confirmed that the remaining loan will cover the remaining part of the project.

Art. 4. a) Amounts so advanced or debited to the loan account together with costs and any expenses incurred by the Bank pertaining to the loan shall bear interest at the rate of _____ percent(___%) per annum calculated on daily balances and payable on the last day of each month. The rate of interest indicated in this contract may vary from time to time according to the interest rate directives or regulations to be issued by the National Bank of Ethiopia or by the decision of this Bank. Hence, the interest rate to be issued by one of the said Banks will replace, as of the date of such change, the interest rate in this contract. In case, the new interest rate exceeds the one applied herein, the Bank at its discretion may either extend repayment period or increase monthly repayment.

b) Should the Borrower/s fail/s to utilize the advances made for the purpose mentioned in this contract or fail/s to pay any installment of the principal due under this contract on due date together with such interest as may have accrued or should there by any non-compliance with the terms and conditions hereof or commit/s any breach thereof, a penalty rate of _____percent (____%) per annum will be applied in addition to the rate of interest provided for under Art. 4(a).

c) When the loan is granted, the Borrower/s shall pay a service charge of _____ percent (_____%) on the amount of loan granted. This charge shall be debited to the loan account and be repaid by the Borrower/s on monthly basis together with the interest rate stipulated herein after being calculated proportionally to the life of the loan.

d) The Borrower/s shall pay a commitment charge of 0.75% per annum on the amount of the undrawn balance of the loan granted from the date of signature until the whole advance is withdrawn. Such commitment charge shall be calculated on daily basis and payable on the last day of each month.

Art. 5. a) The Borrower/s agree/s to pay Ethiopian Birr_____)
(_____)
monthly at the _____ branch of the Bank since _____20_____ or its equivalent in US dollar at the Bank's account aviable at _____ Bank or such payment shall be effected pursuant to the agreement to be reached by the parties, and settle the amount advanced with the interest thereon including any costs and expenses arising out of this contract before or on the date mentioned in Article 1 hereof. The Borrower/s further agree/s to pay monthly since the date of contract, the interest accrued on the amount advanced before_____20____.

b) Any payment made by the Borrower/s shall first be applied to costs and expenses incurred by the Bank, then to payment of the first installment of interest due and then to principal.

c) Should the Bank demand, the Borrower's at any time will make a signed negotiable promissory notes payable to the Bank for the amount or amounts due under this loan agreement. The issuance of such promissory note shall not be construed as a novation of this loan contract. The Borrower/s shall bear all the expenses incurred to the issuance of such promissory notes.

Art. 6. In order to secure the repayment of the loan as per this agreement, the Borrower/s hereby constitute(s) property situated at_____ Town, Woreda_____ Keble_____ evidenced by title deed No. _____ as a first degree mortgage and possession of such title deed being delivered to the Bank.

Art. 7. With regard to the mortgaged property, the Borrower/s warrant/s and affirm(s) that:-

a) he/she/it/they is/are the owner/s of the said property,
b) he/she/it/they has/have a good and lawful right to the property,
c) he/she/it/they is/are the lawful possessor/s of the property(ies) mortgaged and that same is/are free from any encumbrances whether judicial, legal or contractual except for securing debts pertaining to this contract.

Art. 8 a) The Borrower/s agree/s to insure the mortgaged property against fire and renew same at the insurance Company acceptable by the Bank or the Bank at its option insure the mortgage property and/or renew the policy at the Borrower/s expense. In both cases the Bank shall be the first beneficiary. Any outlays assumed by the Bank to insure the mortgage and or to renew the policy shall be debited to the loan account and be repaid by the Borrower/s with the interest rate specified herein until the debt is fully settled.

b) The extent of the aforementioned life policy must be acceptable to the Bank and if the Borrower/s is/are incapable to pay during the life period of the loan for whatever reason, then the Bank may do so and such expenses assumed by the Bank will be debited to the loan account and shall also bear interest as provided herein.

c) After fully understanding the Mortgage Redemption Policy No. AMP 7384G and its amendment, which the Bank has entered into with Ethiopian Insurance Corporation life Insurance Section, the Borrower/s agreed to assume the benefits and liabilities emanating therefrom.

Art. 9. For the purpose of determining the full compliance with the provisions hereof, the Bank may at any time inspect and check the condition and status of the business and/or all the properties given as security for the performance of the obligations under this contract.

Art. 10. The Borrower/s undertake/s to keep in good condition and to properly maintain the property that constitutes part of the security.

Art. 11. The Borrower/s agree/s that compensation arising out of the expropriation of the mortgaged or pledged property or any part thereof shall be paid to the Bank in reduction or settlement of the debt.

Art. 12. In the event of failure of the Borrower/s to discharge the obligations assumed herein with interest or any part thereof or any costs and expenses as provided hereby, the Bank shall have the right to reimburse itself from any and all sums, which the Borrower/s must have on deposit or otherwise with the Bank

መ. የተሸከርካሪ መኪናዎች መግለጫ

የባለቤቱ ስም	የመኪናው አይነት	የሞተሩ ቁ	የሻሲው ቁ	የባለቤትነት ማስመዝገቢያ ደብተር ቁ	የዋጋው ግምት	

ስንብብ የለውም

ሠ. የንግድ መደብ መያዣ

ማሳሰቢያ፡—የንግዱ መደብር ቅርንጫፎች ያሉት ከሆነ መጠቀስ አለባቸው።

የንግዱ ስም	የቤለቤቱ ስም	የንግዱ ዓላማ	የፈቃድ ቁጥር	ከተማ	ክፍለ ከተማ	ወረዳ	የሕንጻ ቁጥር

ስንብብ የለውም

ቀጽ ፩. ሀ/ በዋስትና የተያዘው የንግድ መደብር መሣሪያዎችና ዕቃዎች ዓይነት ከዚህ ጋር በተያያዘው ዝርዝር ላይ ተገልጿል።

ለ/ በዋስትና የተያዘው የንግድ መደብር ወደፊት የሚጨምራቸው ንብረቶች ሁሉ በዚህ ውል መሠረት ለሚፈለገው ዕዳ ክፍያ ተጨማሪ ዋስትና ሆነው በመያዣነት እንደተሰጡ ይቆጠራሉ።

ሐ/ ይህ መያዣ በዋስትና ከተሰጠ ት ንብረቶች ጋር ተነስረውና ተያይዘው የሚገኙትን መብቶችና የንብረቶቹ ተቀጥላ አካሎችን ፣ንዲሁም የንግድ መደብሩን ግዙፍነት የሌለቸው ነገሮች ሁሉ ያጠቃልላል።

ቀጽ ፯. በዚህ ውል መሠረት ተበዳሪው በመያዣነት የሰጣቸውን ዕቃዎች /የባለቤትነት ወይም የባለንብረትነት ማረጋገጫ ሰነዶች/ የሚተላለፉ የገንዘብ ሰነዶችን (የንግድ ወረቀቶች ፣ ሊተላለፉ የሚችሉ ሰነዶች ፣ የዕቃ ባለቤትነት ማረጋገጫ ሰነዶች) በተጥቃሚ ሆነ በተዘዋዋሪ በባንኩ ይዞታ ስር እንደ ማስረከብ ተስማምቷል።

ቀጽ ፰. ተበዳሪው ዘሃስትና ያሲያዛቸው ንብረቶች ወይም ሰነዶች ፣ የራሱመሆናቸውንና ከማንኛውም ከፍርድ ቤት ወይም ከውል ከመነጨ ግዴታዎች ነጻ መሆናቸውን አረጋግጧል። ሆኖም _____

_____

C · 0287

የኢትዮጵያ ንግድ ባንክ

የብድር መክፈት ሂሣብ (አቨርድራፍት) ውል ፡

ይህ ውል ዛሬ ሰኞሌ 22 ቀን ሺህ ዘጠኝ መቶ 86 ዓ. ም. በአቶ በርሀ ገ/ሕዳገ ጆሀሩቱ ኗሪነታቸው በ መቐለ ከተማ በክፍተኛ 1 በቀበሌ 07 በቤት ቁጥር አዲስ የስልክ ቁጥር 400962 ፓ. ሣ. ቁ. ..... የመታወቂያ / የንግድ ፈቃድ ቁጥር 7754/1914/84 በያዙት ፣ ከዚህ ቀጥሎ "ተባዳሪ" እየተባሉ በሚጠሩት ፣ እና በኢትዮጵያ ንግድ ባንክ ፣ ከዚህ ቀጥሎ "ባንክ" እየተባለ በሚጠራው ፣ መካከል ፣ ቀጥሎ በተዘረዘረው ስምምነት መሠረት ተደርጓል ፡

ክፍል አንድ

የአቨርድራፍት ብድር ስለተሰጠበት ዝርዝር ሁኔታ

አንቀጽ 1. በዚህ ውል ውስጥ በተደረገው ስምምነት መሠረት በማናቸውም ጊዜ ሊሰረዝ የሚችል ላልተወሰነ ጊዜ የሚቆይ እስከ ብር 200,000.= (ሁለት መቶ ሺህ ብቻ) የብድር መክፈት (አቨርድራፍት) ሂሣብ ባንኩ ለተበዳሪው ፈቅዷል ፡

አንቀጽ 2. በተሰጠው የአቨርድራፍት ብድርና ባንኩ ባወጣቸው ሌሎች ወጭዎች ላይ በዓመት አሥራአራት በመቶ (14 %) ወለድ በየዕለቱ ቀሪ ሂሣብ ላይ እንደ አውሮፓውያን ቀን አቆጣጠር በየወሩ ይታሰባል ፡ ክፍያው ቢቆረጥ ከተቆረጠበት ቀን ጀምሮ የሚታሰበው ወለድ በዓመት አሥራ ሁለት በመቶ (12%) ይሆናል ፡ ባንኩ የወለድ ወለድ የማስከፈል መብት አለው ፡

አንቀጽ 3. የቴምብር ቀረጥ ፣ የማስመዝገቢያ ክፍያ ፣ የኢንሹራንስ ክፍያ ወይም ይህንን ውል ለማስፈጸም የሚደረግ ማናቸውም ወጪ ሁሉ የሚከፈለው በተበዳሪው ሆኖ ወጪው በአቨርድራፍቱ ሂሣብ ላይ የተጨመረ ከሆነ ወለድ ይታሰብበታል ፡

አንቀጽ 4. ተበዳሪው በዚህ ውል የተፈቀደለት የብድር ገንዘብ የሚውለው ለ ንግድ ሥራ ማስፋፊያ ተግባር ብቻ መሆኑን ያረጋግጣል ፡ ባንኩም ተበዳሪው ገንዘቡን ለተ ባለው አላማ ብቻ የሚጠቀምበት መሆኑን ለማረጋገጥ የተበዳሪውን የንግድ ይዞታ ለመመ ርመር ወይም ለመጉብኘት መብት አለው ፡

ክፍል ሁለት

ንብረት ስለማስያዝ

አንቀጽ 5. ተበዳሪው ለዕዳው ማስከፈያ ዋስትና ይሆን ዘንድ የሚከተሉትን ዕቃዎች (ሸቀጦች) የሚተላለፉ የገንዘብ ሰነዶች ፣ ተሽከርካሪ መኪናዎች / ሕንጻዎች / የንግድ መደብር ወይም ከዚህ ውል ጋር በተያያዘው ዝርዝር ላይ የተመለከቱትን ሌሎች ነገሮች በመያዣነት ሰጥተዋል ፡

ማሳሰቢያ፡— ከታች ከተዘረዘሩት የመያዣ ዓይነቶች መካከል አግባብ የሌለው መያዣ በሚመለከተው ሰንጠረዥ ላይ — አግባብ የለውም — የሚለውን ሐረግ በመጻፍ ይሰረዝ ፡

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መ. የተሸከርካሪ መኪናዎች መግለጫ

	የባለቤቱ ስም	የመኪናው አይነት	የሞተሩ ቁ.	የሻሲው ቁ.	የባለቤትነት መታወቂያ ደብተር ቁ.	የዋጋው ግምት	
1.	አቶ በርሀ ገ/ኪዳን	ደረቅ የጭነ	8210.0	160.2	600	350,000.	=
		ገልባጭ	2073.	93	260093		
			152287				

ሠ. የንግድ መደብ መያዣ

ማሳሰቢያ፡—የንግዱ መደብር ቅርንጫፎች ያሉት ከሆነ መጠቀስ አለባቸው።

የንግዱ ስም	የቤለቤቱ ስም	የንግዱ ዓላማ	የፈቃድ ቁጥር	ከተማ	ክፍለ ከተማ	ቀበሌ	የሕንጻ ቁጥር

ለግቢ የሰው

አንቀጽ ፩ ሀ/ በዋስትና የተያዘው የንግድ መደብር መግሪያዎችና ዕቃዎች ዓይነት ከዚህ ጋር በተያያዘው ዝርዝር ላይ ተገልጿል።

ለ/ በዋስትና የተያዘው የንግድ መደብር ወደፊት የሚጨምራቸው ንብረቶች ሁሉ በዚህ ውል መሠረት ለሚፈለገው ዕዳ ክፍያ ተጨማሪ ዋስትና ሆነው በመያዣነት እንደተሰጡ ይቆጠራሉ።

ሐ/ ይህ መያዣ በዋስትና ከተሰጡት ንብረቶች ጋር ተጎስረውና ተያይዘው የሚገኙትን መብቶችና የንብረቶቹ ተቀጥላ አካሉችን እንዲሁም የንግድ መደብሩን ግዙፍነት የሌለቸው ነገሮች ሁሉ ያጠቃልላል።

አንቀጽ ፯. በዚህ ውል መሠረት ተበዳሪው በመያዣነት የሰጣቸውን ዕቃዎች /የባለቤትነት ወይም የባለንብረትነት ማረጋገጫ ሰነዶች/ የሚተላለፉ የንግዘብ ሰነዶችን (የንግድ መረቶቶች፣ ሊተላለፉ የሚችሉ ሰነዶች፣ የዕቃ ባለቤትነት ማረጋገጫ ሰነዶች) በተፐታም ሆነ በተዘዋዋሪ በባንኩ ይዞታ ስር እንደ ሆኑ ለማስረከብ ተስማምቷል።

አንቀጽ ፰. ተበዳሪው በዋስትና ያስያዛቸው ንብረቶች ወይም ሰነዶች፣ የራሱመሆናቸውንና ከማንኛውም ከሦስተ ወገን ከሕግ ወይም ከውል ከመነጨ ግዴታዎች ነጻ መሆናቸውን አረጋግጧል። ሆኖም _____

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ARTICLE - I
LOAN

Section 1.01: Loan

The Bank agrees to lend to the Borrower, in accordance with the terms and conditions in this Loan Agreement an amount not to exceed Birr 7,803,000.- (Seven Million eight hundred three Birr) for financing the Project and to be disbursed from the Borrower's account direct to contractors, suppliers and/or the Borrower as stipulated hereinder.

1st Disbursement	-	Birr 1,328,100 for contractor or loanee to finance partial cost of building after verification by the Industry Department and Technical and Building Administration Services that the promoter has invested about Birr 2,130,000.- on building from own source.
2nd Disbursement	-	Birr 4,356,900.- to supplier to finance total foreign cost of water pipe and fittings machine mould and partial foreign cost of plastic shoes manufacturing machinery after verification by the Industry Department and Technical and Building Administration Services that the 1st disbursement is properly utilized and the promoter has invested Birr 3,998,200 on opening and financing partial foreign cost of plastic shoes machine, total foreign cost of plastic shoes moulds and household wares machine .-
3rd Disbursement	-	Birr 2,118,000.- to supplier or Loanee to finance cost of working capital requirement and cost of vehicle after verification by Industry Department that the previous disbursements are properly utilized and the promoter has submitted document that testify the arrival of machinery and equipment the promoter committed to cover local and foreign cost of machinery and equipment amounting Birr 1,000,000.- purchase of furniture of Birr 79,700 and payment of the then due interest of Birr 464,000.- is made .

However, before the first disbursement is effected the Borrower shall present a written assurance of his equity contribution in the project which should be disbursed before or concurrently with the disbursal hereabove. Further, before any part of the disbursement is made, the Borrower shall produce evidence to the entire satisfaction of the Bank that the Loan shall be used to carry out the project in accordance with this Agreement.

Section 1.02: Use of the Loan

The Borrower undertakes that it will use the Loan solely and exclusively to finance the reasonable costs of equipment, materials and services required for the project described hereinabove.

Section 1.03: Commitment Charge

The Borrower shall pay a commitment charge of 3/4 of 1% (Three quarters of one per cent) per annum on the amount of the Loan standing to the credit of the Borrower from time to time. Such commitment charge shall accrue from the several dates on which amounts shall be credited to the Loan Account to the date on which it is withdrawn from the Loan Account or are cancelled or modified in any way in accordance with the provisions of the present Loan Agreement.

Section 1.04: Service Charge

The Borrower shall pay a service charge of ¾ of 1% (Three quarters of one per cent) per annum on the principal amount of the Loan. The said service charge shall be calculated from time to time on the unpaid portion of the loan and shall be payable semi-annually together with interest. It shall, however, be discontinued if the borrower fails to discharge its obligation as per the loan agreement and a suit is instituted in a court of law.

Section 1.05: Interest and Sales Tax Rate

(a) The Borrower shall pay interest at the rate of 10.5% (ten and half per cent) per annum on the principal amount of each part of the Loan withdrawn from the Loan Account and outstanding from time to time together with cost and charges incurred hereunder by the Bank.

(b) Interest shall accrue from the respective dates on which amounts shall be so withdrawn and shall be payable semi-annually on July 31 and January 31, of each year commencing on July 31,1999.

(c) The Bank may charge compound interest as permitted by law.

(d) In case of default or failure to repay the principal amount of the Loan and any other charges or default to pay interest thereon, the interest rate applied from the date of such default or failure shall be increased by 3% (three per cent).

(e) Notwithstanding the provisions of sub-sections "a" and "d" of sections 1.05 above, should the Bank or any other competent authority issue a new interest rate, the rate of interest stipulated under sub-section "a" and "d" shall be replaced by the new interest rate.

(f) The Borrower, considering the rate of interest and service charge it undertakes to pay, shall consecutively pay sales tax of 0.525% (point five two five percent) .and 0.0375% (point zero three seven five percent) per annum on the principal amount of each part of the loan disbursed and outstanding from time to time together with interest and

other charges. The Borrower shall also pay sales tax of 0.0375% (point zero three seven five percent) per annum on the amount of the loan standing to the credit of the Borrower from time to time together with costs and charges. Should the Bank vary the sales tax rate, the rate of sales tax stipulated herein shall be replaced by the new sales tax rate.

Section 1.06: Collection Fees and Other Charges

The Borrower undertakes to pay all collection fees, expenses and other charges that may be incurred by the Bank to enforce performance of all the obligations of the Borrower herein.

ARTICLE - II
REPAYMENT

Section 2.01: Repayment

The Borrower undertakes to repay the principal amount of the Loan in 16 semi-annual installments. Payable on January 31 and July 31 starting on July 31,1999 and ending January 31, 2007. The first installment shall be Birr 615,570, the next four installment Birr 615,562 and the rest eleven installments Birr 429,562.

Section 2.02: Appropriation of payment

Repayment made by the Borrower shall be appropriated first to the costs and charges, secondly to the interest and eventually to the principal.

other charges. The Borrower shall also pay sales tax of 0.0375% (point zero three seven five percent) per annum on the amount of the loan standing to the credit of the Borrower from time to time together with costs and charges. Should the Bank vary the sales tax rate, the rate of sales tax stipulated herein shall be replaced by the new sales tax rate.

Section 1.06: Collection Fees and Other Charges

The Borrower undertakes to pay all collection fees, expenses and other charges that may be incurred by the Bank to enforce performance of all the obligations of the Borrower herein.

ARTICLE - II
REPAYMENT

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Section 2.02: Appropriation of payment

Repayment made by the Borrower shall be appropriated first to the costs and charges, secondly to the interest and eventually to the principal.

Section 2.03: Prepayment

The Borrower shall have the right, upon payment of all charges and accrued interest and upon not less than 90 days advance notice to the Bank to repay in advance of maturities of all or any part of the principal amount of the Loan in the time outstanding.

Section 2.04: Promissory Notes

Should the Bank demand the Borrower undertakes to draw and sign, at its own expenses promissory notes payable to the Bank for the amount or amounts then outstanding under this Loan Agreement, and in such text and forms as the Bank may reasonably request.

ARTICLE - III
COVENANTS AND WARRANTIES

Section 3.01: General

The Borrower shall cooperate fully with the Bank to assure that the purpose of the Loan will be accomplished and that therefore the borrower undertakes to furnish to the Bank all such information as the bank shall reasonably request with regard to the general status of the Loan. To that end, the Bank and the borrower shall from time to time exchange views through their representatives with regard to matters relating to the purposes of the Loan and the maintenance of the services thereof. The Borrower shall promptly inform the Bank of any condition which interfere with, or threatens to interfere with the accomplishment of the purposes of the Loan or the maintenance of the Services thereof.

Section 3.04: Undertakings

1. (a) Until payment in full of all sums under this Loan Agreement, the Borrower except as the Bank may otherwise agree in writing shall insure or cause to be insured any equipment and materials financed under this Loan Agreement against risks incident to their purchase and transit to the point of their use in the Project. Such insurance shall be consistent with sound commercial practices.

(b) Cause, wherever applicable, the project to be insured with financially sound insurance companies against loss or damage in such manner and to the same extent as shall be in accordance with good commercial practice with regard to property and business in comparable circumstances. In the event of failure to renew the insurance policy, the Bank shall pay the required premium and debit the Borrower's account and charge 10.5%(ten and half per cent) or more interest per annum.

(c) Maintain its existence and carry on operations and take all steps necessary to maintain and renew all right, powers privileges, concessions and franchises which are necessary and materially useful in the conduct of the business; and

2. Until payment in full of all sums due in this Loan Agreement, the Borrower agrees to inform and obtain the consent of the Bank at least 30 days before committing itself to:-

(c) A default shall have occurred in the performance of any other covenants on the part of the Borrower under this Loan Agreement.

(d) An extraordinary situation shall have arisen which shall, in the opinion of the Bank, make it impossible that the Borrower will be able to perform its obligations under this Loan Agreement.

(e) The Borrower shall have been unable to pay its debts as they mature or any action or proceedings shall have taken by the Borrower or by others whereby any of the property of the project shall or may be distributed among its creditors.

(f) Any other event deemed to be prejudicial to the interest of the Bank shall have occurred.

The right of the Borrower to make withdrawals from the Loan account shall continue to be suspended in whole or in part, as the case may be, until the event or events which gave rise to such suspension shall have ceased to exist or until the Bank shall have notified the Borrower that the right to make withdrawals has been restored, whichever is earlier provided, however, that in the case of any such notice or restoration, the right to make withdrawals shall be restored only to the extent and subject to the conditions specified in such notice and no such notice shall affect or impair any right; power or remedy of the Bank in respect of any other subsequent event described in this section.

Section 4.02: Cancellation

Notwithstanding the provisions of section 4.01 above, the Bank reserves the right to cancel any amount of the Loan in the event the occurrences referred herein are of such nature as to prejudice its interests.

Section 4.03: Reservation

Notwithstanding any cancellation or suspension, all the provisions of this Loan Agreement shall continue in full force and effect except as specifically modified in this Article.

ARTICLE - V
MISCELLANEOUS

Section 5.01: Remedies

If any of the terms and conditions of the present Loan Agreement are in any way violated by the Borrower or any event specified in Article IV shall have occurred and continue for a period deemed to be unreasonable by the Bank, the Bank, at its option, may declare the principal amount of the Loan including all charges, together with interest then outstanding to be due and payable without prejudice to claim all the other remedies available to the Bank under the Laws of Ethiopia; or where the borrower has some of money in any of his account at the bank , the bank has the right to use the said money in the said account for the repayment and /or payment of principal or interest or any other charges that are due.

Section 5.04: Period of Grace

Unless otherwise agreed to in writing, the parties hereto expressly agree that there shall be no period of grace as permitted by Article 1770 of the Civil Code of Ethiopia of 1960 for carrying out their respective obligations under the present Agreement.

Section 5.05: Heirs and Assignees

This Agreement shall further be binding upon the heirs, assignees, and survivors of all the parties, jointly and severally without the benefit of division.

Section 5.06: Mortgage

a) To secure the due and punctual repayment of the Loan, payment of interest and all other charges as well as the due and punctual performance of all other covenants and obligations of the Borrower under this Agreement, the Borrower hereby constitutes in favour of the Bank first degree mortgage upon the whole of the assets and property of the project specified hereinunder in accordance with the relevant provisions of the Ethiopian civil code, commercial code, and Proclamation No. 98/1998:-

1. The project premise registered in the name of the Borrower with title deed No. Lease 0067 and constructed in Addis Ababa, Woreda 28 Kebele 04 in a total area of 1750 square meter.

2. The project established with an Investment permit No. አአ.ባ- and registered with a principal registration certificate No. አአ-3ግኑ-3-42761 and including machineries and equipments to be purchased in the future.

አባሪ ሁለት፤ ለመያዣ ሰጪ የሚሰጥ ማስጠንቀቂያ

ለ .....

ጉዳዩ፣ **የሕግ ማስጠንቀቂያ**

አቶ/ወ/ሮ.....ቀን19.....ዓ.ም. በተፈረመ ብድር ውል መሠረት ከባንኩ ለተበደሩት ብር ...../...../ መያዣ ሰጪ ሆነው መፈረምዎ ይታወሳል።

ተበዳሪው የተበደሩትን ዋና የብድር ገንዘብና በብድሩ ገንዘብ ላይ የታሰበውን ወለድ በብድር ውሉ ውስጥ በተመለከተው የክፍያ ጊዜ መሠረት ተመላሽ ባለማድረጋቸው እ.ኤ.አ. እስከ..... ቀን..... ዓ.ም ድረስ፣

ከዋና..... ብር
ከወለድ..... ብር
በጠቅላላው ብር

የብድር ገንዘብ ይፈለግባቸዋል።

በመሆኑም ይህ ማስጠንቀቂያ ከደረሰዎት ጊዜ ጀምሮ በሚቆጠር በ30 /ሰላሳ/ ተከታታይ ቀናት ውስጥ ከዚህ በላይ የተመለከተው ውዝፍ ገንዘብ መሉ በመሉ ካልተከፈለ በስተቀር ባንኩ በመያዣ የያዘውንና ቀጥሎ የተመለከተውን ፣

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ንብረት በአዋጅ ቁጥር 97/90 ድንጋጌ መሠረት በጨረታ በማሸጥ ከሽያጩ የሚገኘውን ገንዘብ ተበዳሪው ላለባቸው ውዝፍ ገንዘብ ብቻ ሳይሆን ከባንኩ ተበድረው ለወሰዱት ጠቅላላ ዋና የብድር ገንዘብ፣ በዚሁ የብድር ገንዘብ ላይ ለታሰበውና ወደፊትም ብድሩ ተጠናቆ እስከሚከፈል ድረስ ለሚታሰበው ወለድ እና በብድሩ ውል መሠረት ለሚፈጸመ ማናቸውም ወጪና ክፍያዎች እንዲሁም ንብረቱን በጨረታ ለማሸጥ እና ለገርው ስም ለማዛር ለሚያወጣው ማናቸውም ወጪና ክፍያዎች ድምር የሚያውለው መሆኑን በጥብቅ እናስታውቃለን።

ከሠላምታ ጋር

አባሪ አራት፤ በጥ/ቤት የተጀመረን ክስ አቋርጦ በአዋጅ ቁጥር 97/90
መሠረት ለመያዣ ሰጪ የሚሰጥ ማስጠንቀቂያ

ለ .....

ጉዳዩ፣ <u>የሕግ ማስጠንቀቂያ</u>

አዲ/ወ/ሮ..... .....ቀን.....ዓ.ም.ለተበደሩት
ብር...../...../ መያዣ ሰጪ ሆነው መፈረምዎ ይታወሳል።

ይሁንና ተበዳሪው ይህን የብድር ገንዘብና በዚህ ገንዘብ ላይ የታሰበውን ወለድ በብድር ውሉ በተመለከተው የክፍያ ጊዜ መሠረት ተመላሽ ባለማድረጋቸው በ..... ጥ/ቤት ክስ መሥርተውን ጉዳዩ በቀጠሮ ተይዞ የሚገኝ መሆኑ ይታወቃል።

ሆኖም በአዋጅ ቁጥር 97/90 መሠረት በጥ/ቤት በመታየት ላይ ያለ ክስ ወይም አፈፃፀም በባንኩ አመልካችነት ተቋርጦ በመያዣ የተያዘውን ንብረት በጨረታ እንዲሸጥና የብድሩ ገንዘብ እንዲመለስ ለባንኩ ሥልጣን የተሰጠው በመሆኑ ባንኩ በጥ/ቤት ያለውን ክርክር አቋርጦ በመያዣ የያዘውን ንብረት በጨረታ ለማሸጥ ወስኗል።

ስለሆነም እ.ኤ.አ. እስከ.....ቀን ..... ዓ.ም. ድረስ የሚፈለግብዎትን፣

ከዋና..... ብር
ከወለድ..... ብር
በጠቅላላ..... ብር

ውዝፍ የብድር ገንዘብ ይህ ማስጠንቀቂያ ከደረሰዎት ቀን ጀምሮ በ30 /ሰላሳ/ ተከታታይ ቀናት ውስጥ ተጠናቆ እንዲከፈል እያስጠነቀቅን፣ የማይከፈል ቢሆን ግን ለብድሩ ገንዘብ በመያዣ ያስያዙትን፤

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ንብረት በአዋጅ ቁጥር 97/90 ድንጋጌ መሠረት በጨረታ በማሸጥ ከሽያጩ የሚገኘውን ገንዘብ ተበዳሪው ላለባቸው ውዝፍ ገንዘብ ብቻ ሳይሆን ከባንኩ ተበድረው ለመሰዱት ጠቅላላ ዋና የብድር ገንዘብ፣ በዚሁ የብድር ገንዘብ ላይ ለታሰበውና ወደፊትም ብድሩ ተጠናቆ እስከሚከፈል ድረስ ለሚታሰበው ወለድ እና በብድሩ ውል መሠረት ለሚፈጸመው ማናቸውም ወጪና ክፍያዎች እንዲሁም ንብረቱን በጨረታ ለማሸጥ እና ለገዢው ስም ለማዞር ለሚያወጣው ማናቸውም ወጪና ክፍያዎች ድምር የሚያውለው መሆኑን በጥብቅ እናስታውቃለን።

ከሠላምታ ጋር

አባሪ አምስት፣ በጋዜጣ የሚወጣ የ30 ቀን ማስጠንቀቂያ

<u>በአዋጅ ቁጥር 97/90 መሠረት የተሰጠ ማስጠንቀቂያ፣</u>

የኢትዮጵያ ልማት ባንክ ..... ዋናው መ/ቤት / ቅርንጫፍ መ/ቤት ተበዳሪ የሆኑት ..... በብድር የወሰዱትን ገንዘብ ከነወለዱ ይህ ማስጠንቀቂያ በጋዜጣ ታትሞ ከወጣበት ቀን ጀምሮ በሚቆጠር 30 ተከታታይ ቀናት ውስጥ እንዲከፍሉ እያስጠነቀቅን ባይከፍሉ ግን በመያገር የተያዘው፣

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ንብረት በጨረታ በመሸጥ ለዕዳው መክፈያ የሚያውለው መሆኑን ያስታውቃል።

የኢትዮጵያ ልማት ባንክ

DECLARATION

The thesis is my original work, has not been presented for a degree in any other university and that all sources of material used for the thesis have been duly acknowledged.

By Adamu Shiferaw Zeleke AgD

Advisor