IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Regular Second Appeal No.149 of 2011 (O&M)
Date of decision: 16.9.2015

Gurdial Singh and others

... Appellants

Versus

Gurbhagwant Singh alias Gurpreet Singh and others

... Respondents

CORAM: HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr.Pritam Saini, Advocate,
for the appellant.

Mr.H.S.Baidwan, Advocate,
for respondents No.1 to 14.

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1. To be referred to the Reporters or not? Yes.
2. Whether the judgment should be reported in the Digest? Yes.

RAJIV NARAIN RAINA, J.

1. The substantial question of law which arises in this second appeal is whether the transaction dated 10th March, 1897 [Ex.P6] is a mortgage by conditional sale foreclosing right of redemption in mortgagor by default of payment of mortgage money within the stipulated period of 58 years by the mortgagor or his successors-in-interest?

2. The mortgagor and the mortgagee have died long ago leaving a legal battle to be fought by their descendants over the suit property in falling in Gurgaon.

3. The facts of the case are that deed of mortgage by conditional

sale was executed on 10th March, 1897 [Ex.P6] between the predecessors-in-interest of the mortgagor and the mortgagee. The plaintiffs are the mortgagees of suit property. They filed a suit for declaration in the Civil Court at Kharar that they have become owners of the suit property when the defendants failed to get the land redeemed by the appointed year and month by relieving the mortgage then the equity of redemption previously vesting in the defendants stood extinguished on the expiry of 60 years [pre-amended limitation prescribed for redemption suits] after the execution of the mortgage deed in the year 1897. The mortgagee deed recites that right of redemption would expire in the month of *Jeth* of the year 1955 when the mortgage deed would stand converted to a sale deed.

4. The trial court has dismissed the suit on 14th January, 2008 relying on the Full Bench decision of this Court in **Ram Kishan and others** v. **Sheo Ram and others;** 2008 (1) CCC 414 and applying the law declared therein holding that there is no limitation for redemption of a usufructuary mortgage. The limitation for redemption would run from the date fixed in the mortgage deed, that is, from *Jeth* 1955. In short the trial Judge mistakenly read the 1897 deed as a usufructuary mortgage and not a mortgage by conditional sale. This was a monumental error resulting from the pleaded defence of the erstwhile owners of property in their written statement itself that the transaction between their ancestor and the ancestor of the mortgagee settled in 1897 was a usufructuary mortgage whereas the old document was far from it. It was a mortgage by conditional sale to which a separate law attaches as discussed hereafter.

5. The appeal court has rightly reversed the decree and the

findings of the learned trial Court on the point and has accepted the appeal vide judgment and decree dated 12th October, 2010 from where this appeal arises, preferred by the defendants. The reasoning adopted by the court of first appeal is original and requires no serious discussion on the applicability of the Full Bench ruling in **Ram Kishan's** case [supra] which was then available but the judgment in appeal before the Supreme Court rendered in **Singh Ram (Dead) Through LRs v. Sheo Ram & Others**, (2014) 9 SCC 185 from the decision of the Full Bench was not available. The appellate Court properly distinguished the ruling on facts.

6. After noticing the decision of the Full Bench in **Ram Kishan's** case [supra], the lower appeal court carefully read the mortgage deed Ex.P6 and the recitals contained therein as a whole and ventured a finding contrary to the wrong assumption of the trial Judge that the deed did not present features of a usufructuary mortgage but of a mortgage by conditional sale falling within the teeth of the definition in Section 58 (c) of the Transfer of Property Act, 1882 and therefore the ratio of the aforesaid rulings was of no avail to the unsuccessful defendants to pray for dismissal of the suit on the specious plea that right to redemption of the property in dispute was not foreclosed on the maxim-once a mortgage, always a mortgage and always open to redemption and is never irredeemable. Or to put it in another way; once a recompense, always a recompense. This principle would not be applicable to a case falling under Section 58 (c) of the Act.

7. The deed in translation from the Urdu reveals the following terms and conditions upon which the fate of this case would hinge:

> "We, Atru s/o Nodha and Hira, Hamira sons of

Dhayana and Kirpa, major, in person and as guardian of Watloka, minor sons of Wazira, Caste Saini, residents of village Khizrabad, presently residing as Khewatdar at village Gochar, Tehsil & Distt. Ambala. We are in possession of land measuring 35-17, Kham Khewat No.25 and Khatauni No.69, revenue 3/14/9 and 10 Biswa joint land bearing Khewat No.26 and Khatauni No.86, total measuring 36-7 situated in the area of village Gochar and 3 plots of Kachha houses, bounded as under, situated at the said village Gochar. Now, we with our own consent and free will, have mortgaged with possession the aforesaid land together with share in will, heap of manure, Abadi and Ghair Abadi, passage, "Gauhar", and aforesaid houses with condition of sale with Deva Singh and Mehru sons of Kesaria, both in euqal share to the extent of 2/3 share and Jaimat & Nehal sons of Jassa, both in equal share to the extent of 1/3 share, caste Jatt, residents of village Abhipur, Tehsil Kharar, in lieu of ₹ 896 half of which constitutes ₹ 448, as per current currency. We have received entire mortgaged money in the following manner. We received ₹ 48 in advance at home. Now we have received ₹ 848 in presence of Sub-Registrar. Today, possession of mortgaged land and houses has been delivered to mortgagees. During the mortgage period mortgagees will have the right of cultivation and to enjoy its produce. Also, they will be responsible to pay the cess. It is conditioned that we, the mortgagers, will get the mortgaged land and houses redeemed when we will have paid the lump sum mortgage money in

> the month of Jaishta, 1955, otherwise in this very mortgage money the abovesaid mortgaged land and houses would be considered to have been sold and this mortgage deed would be considered as sale deed.

8. Thus, of the total mortgage money in a sum of ₹ 948/- the mortgagor received ₹ 900/- before the Sub Registrar in 1897 and the remaining amount of ₹ 48/- towards advance on the residential house built on the suit land. There was a recital that possession was delivered to the mortgagees who had the right to appropriate the produce of the land for their own benefit during the subsistence of the mortgage till redemption. The other recitals were that if the mortgagor failed to get the mortgaged property redeemed up to the month of Jeth, 1955 by paying the mortgaged money in lump sum, in that event, the mortgaged land and house shall be considered to have been sold in a sum within the amount agreed on the mortgage and the mortgage shall be considered as a sale. Therefore, the mortgage amount was the market value of the suit property in 1897. In these circumstances it was the considered view of the appeal court that the period of limitation would start from the month of Jeth, 1955. Article Section 61 (a) of Schedule to the Limitation Act, 1963 prescribes that the mortgaged property could be redeemed within the amended period of 30 years from the date when the right to redeem or to recover possession accrues. The Court thought that the suit for redemption could have been filed only up to the year 1985 and not thereafter. If mortgagor failed to act and pay the mortgage amount then the mortgagees become owners of the suit property by effluxion of time.

9. The first appeal court noticed the decision of the Supreme

Court in **Prabhakaran and others** v. **M. Azhagiripillai (dead) by LRs and others; (2006) 4 SCC 484** hotly debated before the Full Bench in **Ram Kishan's** case [supra] where the Supreme Court held that if the mortgage deed itself stipulates a date or the outer limit fixed in the mortgage is exceeded, then the right to redeem accrues immediately on execution of the mortgage deed and the mortgagor has to file a suit for redemption within a period of 30 years from the date of mortgage. The period of limitation for a suit for redemption is 30 years under Article 61 (a) of the Limitation Act, 1963, while the period of limitation was 60 years under the corresponding Article 148 of the repealed Limitation Act, 1908. However, if the limitation applicable under the un-amended Limitation Act was 60 years [reduced to 30 years in the present Act] then the defendants could have filed a suit for redemption up to 1955 Jeth but such a suit was not filed and therefore they have lost their right to redeem the mortgaged property and the plaintiffs are entitled to continue in possession as full owners by prescription, the equity of redemption lost to the mortgagor. **Prabhakaran** case was distinguished in **Ram Kishan** case and later in appeal against the decision in **Ram Kishan** case it would be declared not good law in **Singh Ram (Dead) Through LRs v. Sheo Ram & Others**, (2014) 9 SCC 185 upholding the Full Bench but restricting its ratio to usufructuary mortgages alone. This view as said earlier was not available to the court of first appeal.

10. The court of first appeal without saying as much explicitly applied the law in para. 42 of the judgment of the Full Bench in **Ram Kishan case** [supra]. Para. 42 reads as follows : -

> 42. Therefore, we answer the questions framed to hold <u>that in case of usufructuary mortgage, where no time limit</u>

> is fixed to seek redemption, the right to seek redemption would not arise on the date of mortgage but will arise on the date when the mortgagor pays or tenders to the mortgagee or deposits in Court, the mortgage money or the balance thereof. Thus, it is held that once a mortgage always a mortgage and is always redeemable. (underlined for emphasis)

11. The appeal court isolated the observations of the Full Bench by focussing on the following words used in the judgment in para. 42 of the report; being the part which may create some doubt, to take his discussion forward

> "...where no time limit is fixed to seek redemption, the right to seek redemption would not arise on the date of mortgage but will arise on the date when the mortgagor pays..."

12. This ambiguously might mean that if time limit was not fixed, right to redeem would arise on the date of the mortgage but when the mortgagor pays the amount of mortgage. The date of the mortgage here is long ago in 1897. When the observations made in para. 42 are read in their isolated part in the context of the subject matter then there is hardly any confusion of words, there is little ambiguity.

13. Still further, the Full Bench explained and distinguished **Prabhakaran's** case [supra] in para. 37 of the report by observing : -

> "In *Prabhakaran's* case (supra), the primary question again was in respect of acknowledgment. Though in para No.13 of the judgment it has been observed that in case of a usufructuary mortgage which does not fix any date for repayment of the mortgage money, the right to redeem would accrue immediately on execution of the mortgage deed. But said observation is obiter inasmuch as Hon'ble Supreme Court has allowed the appeal of the mortgagor for

> redemption while holding that there is acknowledgment. Therefore, the said judgment provides little assistance to the mortgagees."

14. It is the contention of Mr. Baidwan learned counsel appearing for the plaintiff-respondent-mortgagee that indisputably the date for redemption in the mortgage deed was fixed up to *Jeth*, 1955 when certain events were expected to follow as designed by the predecessors of the parties but were not accomplished by the successors of the mortgagor. If there is a categorical stipulation in the mortgage deed as witnessed presently, then the case of the defendants was foreclosed and they could not recover possession of the land as owners as they had lost, waived or surrendered such rights by virtue of not seeking redemption of mortgage within the rather long time frame agreed upon to recover property by payment of mortgage money. What he says is that limitation would start running from Jeth, 1955 and remain co-terminus with Jeth, 1985 extinguishing forever the rights of the mortgagors in case of default. When the suit was not brought by the defendants to assert and claim their rights within the period prescribed, then even if a suit were filed today, it would be barred by Article 61 (a) of the Limitation Act, 1963. This aspect is open to further discussion at the appropriate place in this judgment as the view the appeal Judge took a view on limitation which may be inconsistent with a mortgage by conditional sale, if it were truly one such on a reading of the mortgage deed of 1897 which the court thought it was.

15. The other reason which weighed in the mind of the lower appeal court to reverse the finding of the trial court was that on failure to invoke equity of redemption till the month of *Jeth* 1955 then the mortgage

deed would itself be treated as a sale on consideration of the mortgage amount. The lower appeal Court fitted the case into the category of mortgage by conditional sale holding it was not a case of a usufructuary mortgage. Mortgages by conditional sale are defined in Section 58 (c) of the Transfer of Property Act, 1882. The provisions of which read as follows : -

> 58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgage-deed" defined.
>
> (a) xxx
>
> (b) xxx
>
> **(c) Mortgage by conditional sale. --** Where, the mortgagor ostensibly sells the mortgaged property --
>
> on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or
>
> on condition that on such payment being made the sale shall become void, or
>
> on condition that on such payment being made the buyer shall transfer the property to the seller,
>
> the transaction is called mortgage by conditional sale and the mortgagee a mortgage by conditional sale;
>
> [Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purposes to effect the sale.]

16. The appeal court held that the contents of the mortgage deed Ex.P6 indicate that the predecessors-in-interest of the defendants had executed the mortgage by conditional sale in favour of the predecessors-in-interest of the plaintiffs. Thus, the true intention of the parties is reflected in the contents of the mortgage deed Ex.P6 which alone will govern the rights of the parties. There was no dispute that the possession had been delivered to the mortgagees on receipt of the mortgage amount. The Court *a quo* held that the mortgage deed was one by way of conditional sale and for this

reason alone the plaintiffs have become owners in possession of the suit property. On these premises, the appeal succeeded and the judgment of the court of first instance was reversed.

17. During the pendency of this appeal since the year 2004 the decision in the Full Bench was rendered about 4 years thereafter in 2008. In appeal to the Supreme Court, the decision in **Ram Kishan's** case [supra] was affirmed in case titled **Singh Ram (Dead) Through LRs v. Sheo Ram & Others**, (2014) 9 SCC 185. In para. 10, the Supreme Court held : -

> "11. We are in agreement with the view taken in the impugned judgment that in a usufructuary mortgage, right to recover possession continues till the money is paid from the rents and profits or where it is partly paid out of rents and profits when the balance is paid by the mortgagor or deposited in Court as provided under Section 62 of the T.P. Act."

18. After noticing the provisions of the applicable law on the subject including Article 61 of the Schedule to the Limitation Act, 1963 where the suits by the mortgagor to redeem or recover possession of immovable property mortgaged is 30 years counted from when the right to redeem or to recover possession accrues, the Supreme Court laid down binding *dicta* at the end of para. 12 of the report holding as follows : -

> "A perusal of above provisions shows that Article 61 refers to right to redeem or recover possession. While right of mortgagor to redeem is dealt with under Section 60 of the T.P. Act, the right of usufructuary mortgagor to recover possession is specially dealt with under Section 62. Section 62 is applicable only to usufructuary mortgages and not to any other mortgage. The said right of usufructuary mortgagor though styled as 'right to recover possession' is for all purposes, right to redeem and to recover possession.

> Thus, while in case of any other mortgage, right to redeem is covered under Section 60, in case of usufructuary mortgage, right to recover possession is dealt with under Section 62 and commences on payment of mortgage money out of the usufructs or partly out of the usufructs and partly on payment or deposit by the mortgagor. This distinction in a usufructuary mortgage and any other mortgage is clearly borne out from provisions of Sections 58, 60 and 62 of the T.P. Act read with Article 61 of the Schedule to the Limitation Act. Usufructuary mortgage cannot be treated at par with any other mortgage, as doing so will defeat the scheme of Section 62 of the T.P. Act and the equity. This right of the usufructuary mortgagor is not only an equitable right, it has statutory recognition under Section 62 of the T.P. Act. There is no principle of law on which this right can be defeated. Any contrary view, which does not take into account the special right of usufructuary mortgagor under Section 62 of the T.P. Act, has to be held to be erroneous on this ground or has to be limited to a mortgage other than a usufructuary mortgage. Accordingly, we uphold the view taken by the Full Bench that in case of usufructuary mortgage, mere expiry of a period of 30 years from the date of creation of the mortgage does not extinguish the right of the mortgagor under Section 62 of the T.P. Act."

19. The ratio of the decision in **Prabhakaran's** case [supra] was not approved. The observations in para. 13 of **Prabhakaran's** case [supra] were not held to be the correct view in law. The Supreme Court observed: -

> "The above observations do not take into account the special right of usufructuary mortgagor under Section 62 of the T.P. Act to recover possession which commences after mortgage money is paid out of rents and profits or partly out of rents and profits and partly paid or deposited by mortgagor. Thus, we are unable to accept the same as correct view in law."

20. The operative part of the ruling in **Singh Ram** is contained in paragraph 22 of the report which reads : -

> "15. We, thus, hold that special right of usufructuary mortgagor under Section 62 of the T.P. Act to recover possession commences in the manner specified therein, i.e., when mortgage money is paid out of rents and profits or partly out of rents and profits and partly by payment or deposit by mortgagor. Until then, limitation does not start for purposes of Article 61 of the Schedule to the Limitation Act. A usufructuary mortgagee is not entitled to file a suit for declaration that he had become an owner merely on the expiry of 30 years from the date of the mortgage. We answer the question accordingly."

21. Then, Mr. Baidwan learned counsel appearing for the plaintiff culls out from the judgment in **Singh Ram (D)'s** case [supra] that the decision is restricted to usufructuary mortgage alone and not to any other mortgage. This is no doubt correct in view of the observations of the Supreme Court with regard to Section 62 and the ratio is applicable to usufructuary mortgage and not to any other mortgage. He would submit whether the terms of the mortgage deed can be avoided or brushed under the carpet and they have to be given the meaning which parties intended in the year 1897 as the relationship between the parties is contractual in nature. He reads in Court the following lines which are reproduced in roman script:-

> *"Sharat je hai ke ham rahenan me jeth 1955 zar rehan nakad zakmusht (lumpsum) muthanan ko ada kar denge to arazi v makanat marhuna chudwa levenge varna esi zar rehan main arazi v makanat marhuna mazkura bai kamal tasuvar hogi. Rahan haza bainama samja javega."*

22. He cites two other decisions of the this Court from where he

says that illuminated side lanes have been carved out by two Single Bench decisions of this Court after noticing the decisions in **Ram Kishan's** case and **Singh Ram's** case [supra]. These rulings are the following citations.

23. In **Gurnam Singh and others** v. **Hazara Singh and another;** 2015 (1) PLR 856, the single bench was confronted with the situation where the mortgage deed itself was not proved in evidence. In the absence of proof of the terms and conditions of the mortgage, and more importantly, the date/period, if any, that was stipulated in the mortgage deed for redemption of the suit property, the plaintiffs who were mortgagees could not ask for declaration that they have become owners since it was *ex facie* neither pleaded nor proved if any date was stipulated for redemption of the suit property. If the mortgage deed is itself not proved by evidence and it was a disputed fact, then the principle of once a mortgage is always mortgage and is always redeemable would not be applicable. The Court, therefore, held that right to foreclosure will not accrue to the mortgagee till such time the mortgagee remains in possession of the mortgaged security and is appropriating usufruct of the mortgaged land towards the interest on the mortgaged debt.

24. With a view to distinguish the judgment Mr. Pritam Saini learned counsel appearing for the appellants-defendants rises and submits that in the judgment in **Gurnam Singh**, there is no discussion on Article 61 of the Limitation Act, 1963 which was the sheet anchor of the decisions of this Court and the Supreme Court in the authorities [supra] and therefore the case is distinguishable. I think there is substance in the submission and the case can be of no help.

25. Mr. Baidwan then relies on **Jai Ram and another** v. **Surender and others;** 2015 (1) ICC 385 another single bench decision. In this case, no time limit was fixed in the mortgage deed and when no time limit is fixed to seek redemption, the court held that the right to seek redemption would not arise on the date of mortgage but will arise on the date when the mortgagor deposits in court the mortgage money or balance thereof. Learned Single Judge applied the law laid down in **Ram Kishan's** case [supra] and **Singh Ram's** case [supra]. The drift of the argument of Mr. Baidwan in relying on these two cases is that the judgment of the Supreme Court in **Singh Ram's** case [supra] is itself distinguishable on the facts of this case on the point that where outer time limit has been fixed in the mortgage deed, then the limitation would run under Article 61 of the Limitation Act, 1963 from the date fixed which means in this case *Jeth* 1955 and therefore the suit was barred by law.

26. In **Jai Ram's** case [supra], it was contended by the plaintiffs that it was not a case of usufructuary mortgage but an anomalous mortgage, but the assertion was not accepted on evidence on record and thus the lower courts had returned a finding that a reading of the mortgage deed showed presence of an usufructuary relationship in the mortgage. This case is also of no help to the respondents/mortgagees.

27. In order to appreciate Mr. Baidwan's argument in his main line of defence in second appeal, I asked the learned counsel what was the true nature of the mortgage between the parties; was it usufructuary mortgage or was it a mortgage by conditional sale and what to make of it when an issue was not framed by the trial court as to the nature of the mortgage as to

whether it was usufructuary one or a mortgage by conditional sale. It is this aspect that has engaged the mind of this court during the debate up to re-hearing the appeal for certain clarifications on the nature of the deed in the light of case law and almost everything to my mind will depend on the answer to the question. The answer most certainly and without doubt depends on the text of the mortgage deed and whether it reveals a usufructuary mortgage or a mortgage by conditional sale, given that the two are governed by different statutory provisions in the Transfer of Property Act, 1882 and give rise to a pure question of law which is substantial within the meaning of Section 100 of the Code of Civil Procedure and open to debate and goes to the very root of the case upon which the superstructure will stand or fall.

28. The right of a usufructuary mortgagor to recover possession is specifically dealt with in Section 62 of the Transfer of Property Act. There are seven types of mortgages recognized in the Transfer of Property Act, i.e., simple mortgage, mortgage by conditional sale, usufructuary mortgage, English mortgage, mortgage by deposit of title deeds and anomalous mortgage. These mortgages are defined in Sub-Sections (b) to (g) of Section 58 of the TPA. Section 58 (c) deals with mortgage by conditional sale while Sub-Section (d) deals with usufructuary mortgage. The mortgages of the types in Sub-Section (c), (e), (f) and (g) are covered by Section 60 of the Transfer of Property Act which provision is reproduced below for ready reference: -

> **“60. Right of mortgagor to redeem.--** At any time after the principal money has become [due], the mortgagor has a right, on payment or tender, at a proper time and place, of

> the mortgage-money, to require the mortgagee (a) to deliver to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:
>
> Provided that the right conferred by this Section has not been extinguished by act of the parties or by decree of a Court.
>
> The right conferred by this Section is called a right to redeem and a suit to enforce it is called a suit for redemption.
>
> Nothing in this Section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.
>
> **Redemption of portion of mortgaged property.--** Nothing in this Section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except only where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor."

29. Proviso to Section 60 preserves their right to redeem by the mortgagor when right conferred by the Section has not been extinguished by act of the parties or by the decree of a Court. The mortgagor never went to

court as plaintiff to redeem and, therefore, there is no decree qua him/them.

30. A question arises if the terms and conditions of the mortgage deed dated 10th March, 1897 Ex.P6 extinguished the right to redeem a mortgage by conditional sale, then needless to say, for a case to fall within the meaning of mortgage by conditional sale there are three pre-conditions prescribed in Section 58-(c) and for this, it would be best to reproduce the statutory definition and the relevant part of the Section:-

> **(c) Mortgage by conditional sale. --** Where, the mortgagor ostensibly sells the mortgaged property --
>
> on condition that no default of payment of the mortgage-money on a certain date the sale shall become absolute, or
>
> on condition that on such payment being made the sale shall become void, or
>
> on condition that on such payment being made the buyer shall transfer the property to the seller,
>
> the transaction is called mortgage by conditional sale and the mortgagee a mortgage by conditional sale;
>
> [Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purposes to effect the sale.]"

31. It appears that any of the three conditions mandated in Sub-Section are not satisfied [since the word, "or" has been used to separate the three], then the transaction will not be mortgage by a conditional sale. The lower appellate court has returned a finding on the evidence on record that the mortgage deed Ex.P6 was by conditional sale and this finding is in favour of the plaintiffs.

32. To my mind also, the classic features of a usufructuary mortgage by definition are not found from the available record and on

reading the terms and conditions embodied in mortgage deed, 1897 there is hardly any doubt left as to the true nature of the transaction being one of conditional sale. It may be that the defendants took the plea of usufructuary mortgage in the written statement but they did not claim an issue for a finding to be returned thereon, the onus being on them to promote their case or point of view. The trial Court did not say a word on the nature of the mortgage and kept to the law declared in **Ram Kishan's** case [supra] without seeking out the distinction between a usufructuary mortgage or a mortgage by conditional sale. The reliance it placed on the Full Bench was blind. There can be no dispute that the law laid down by this Court and the Supreme Court in the cases [supra] applies only to usufructuary mortgage and not other mortgages. This is the only clarification made by the Supreme Court in **Singh Ram's** case while affirming the judgment of the Full Bench in **Ram Kishan's** case [supra] that its ratio is relevant only in a case of a usufructuary mortgage and not any other mortgage.

33. There is neither an assumption nor a presumption in law that the transaction between the parties in the present case from where rights are traced was a usufructuary mortgage where the recitals in the mortgage deed authorized mortgagee to retain possession of the mortgaged property and the mortgagor received rent and profits or part of rents and profits in lieu of interest or in payment of part payment of mortgage money. These ingredients are apparently missing in the lower court record. We have to do nothing more than compare the ingredients in the definition and description of mortgage by conditional sale and a usufructuary mortgage in Section 58 of the TPA, 1882 and read them alongside. The first kind is reproduced

supra while the second kind of mortgage in Sub-Section (d) of Section 58 reads:-

> "(d) *Usufructuary mortgage*-Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called a usufructuary mortgage and the mortgagee a usufructuary mortgagee."

34. I am, therefore, inclined to agree with the opinion of the court of first appeal on the evidence available on record and with the contention of the respondent that the present case is not a case of usufructuary mortgage at all but of a mortgage by conditional sale and thus, the law laid down in **Ram Kishan** and **Singh Ram's** cases [supra] is inapplicable on a true construction of the recitals of the mortgage deed executed on 10th March, 1897 [Ex.P6]. Learned lower appeal court has properly applied the law by distinguishing **Ram Kishan's** case [supra] while the decision of the Supreme Court in **Singh Ram's** case in appeal against the judgment of the Full Bench was not available to it but it came not just close enough but almost pat on the point of what became the distinguishing feature in the Supreme Court judgment pronounced on August 21, 2014 that the law laid down in **Ram Kishan's** case was with respect to usufructuary mortgages alone where the principle- "once a mortgage always a mortgage and always

open to redemption" applies. However, this principle would not apply to a mortgage by conditional sale nor would suffer the bar in Article 61 of the Limitation Act, 1963 which principle would apply only to a usufructuary mortgage and not any other of the several types of mortgages in Section58 TPA and at least not the one under consideration presently. The terms of the mortgage deed Ex.P6 are wholly incompatible with the definition of a usufructuary mortgage. In the mortgage it was embodied in writing that if redemption money is not paid there would be an ostensible sale on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute and therefore the test of the first condition of Section 58 (c) of the TPA was amply satisfied. I therefore hold that the rights of the parties are governed by a mortgage by conditional sale. The mortgagors rights in suit land stand extinguished by default of the condition precedent of payment of sum of mortgage money and their remedy is taken away. The right of mortgagor to redeem under Section 60 of the TPA is hit by the proviso incorporated in the Section that right to redeem conferred has not been extinguished by act of the parties and only then redemption by tender of principal mortgage amount is possible if right is alive or there is a court decree, otherwise it is not so preserved.

35. In order to understand the import of the provisions of Section 58(c) of the Transfer of Property Act, 1882 in a more comprehensive manner it would be useful to read past precedents on the subject in cleaving the divide between the concepts of mortgage and conditional sale. To unravel the distinction reference must be directed to the foremost ruling on the point in the Division Bench ruling of this Court in **Lal Chand** v. **Atma**

Ram and others; AIR 1960 Punjab 444 : 1960 PLR 586 : 1960 (2) ILR (Punjab) 741. The Division Bench speaking through Hon. Tek Chand, J. culled out the principles involved in both the concepts. The Court guided that the mortgage leaves title to property in the grantor and gives to the grantee only a lien on it by means of which the grantee is authorized to appropriate the property mortgaged to the extent of its value, to secure payment of the debt thus secured. However, conditional sale confers on the grantee title to the property giving the grantor the right to repurchase it at a certain price within the stated period [see para. 33 of the report]. The party which alleges that an instrument absolute on its face is an absolute conveyance, is in reality intended as a mortgage has to discharge the burden of proving such an allegation. The Court insists on a clear unequivocal and satisfactory proof for rebutting the presumption. The burden of overcoming such a presumption raised from the terms of the written instruments rests upon the moving party. The Division Bench had occasion on facts to examine a case where a deed of simple mortgage of property was for a consideration of ₹ 5500/-. The possession was to remain with the mortgagor who undertook to pay interest @ -/13/- per cent per mensem but in the event of party paying interest regularly, the rate of interest would be reduced to -/ 9/- per cent per mensem. No interest of any kind was paid by the mortgagors. The mortgage was executed on 23rd November, 1936 between Lal Chand plaintiff and his father Kallu Mal in favour of the defendants. On 4th October, 1940, three documents were executed by Lal Chand and his father Kallu Mal, having died in the meanwhile. A deed of sale was executed by the plaintiff, the price payable being ₹ 8000/-. The consideration was comprised of the principal amount owed to the mortgagee, i.e. ₹ 5500/-, plus interest due in a sum of ₹ 2070/- and cash taken at the time of the execution of the sale deed, ₹ 430/-. The second document was an agreement to re-convey whereby the vendees agreed to resell the property to the vendor for ₹8000/- within a period of two years on the condition that the obligee, i.e., the plaintiff-vendor, paid every quarter and within a period of fifteen days after the lapse of three months the rent which had been agreed upon according to the rent deed executed on the same day. The right of repurchase was dependent on regular payment of rent and thereafter on the expiration of 2 years, the obligee would continue the right of purchase for a further period of one year on the same condition. It was also stated in the post script by the executants that if they did not abide by the conditions in the agreements, the obligee might get it done through Court. If the obligee liked, he might get the instrument registered at his own expense. The third document executed the same day was a rent deed by which Lal Chand undertook to pay rent at the rate of ₹ 33/- per mensem subject to certain conditions already referred to above. The plaintiff failed to pay any rent and by ejectment proceedings taken before the Rent Controller, the plaintiff was got evicted by the defendants. Lal Chand brought the suit on 30th September, 1952 nearly 12 years after the execution of the three documents. The plaintiff maintained that the transaction though couched in terms of unconditional sale, was essentially a mortgage and he was never divested of his status as a mortgagor and now asserts his right to redeem the property and therefore, the suit was filed for possession by way of redemption on payment of such sum as may be found due against him. The

Court noticed several earlier decisions of this Court and of other High Courts and the Supreme Court to resolve the dispute. The Court in para. 24 of the reported text noticed the remarks of Hon. Vivian Bose, J. in **Pandit Chunchun Jha** v. **Sheikh Ebadat Ali,** AIR 1954 SC 345 that the question whether a transaction was a mortgage by conditional sale or a sale outright with a condition of repurchase was a vexed one which invariably gave rise to trouble and litigation. Bose, J. said :-

> "There are numerous decisions on the point and much industry has been expended in some of the High Courts in collating and analyzing them. We think that is a fruitless task because two documents are seldom expressed in identical terms and when it is necessary to consider the attendant circumstances the imponderable variables which that brings in its train make it impossible to compare one case with another. Each must be decided on its own facts. But certain broad principles remain."

36. The Court read the sale deed where the vendor Lal Chand had stated:-

> "I have absolutely sold our double-storeyed Haveli; I have withdrawn my possession from over the entire property * * after putting the vendees aforesaid from today in actual possession over the same; The vendees shall continue to be in possession as proprietors over the sold property generation after generation. They shall be competent to make permanent or temporary transfer (of the property) and to receive the rents etc. of all kinds."

37. The deed of conveyance contained the following recitals in words reproduced next: -

> "If the said obligee (plaintiff-vendor) violates the conditions of the rent deed of today's date written by him in our (the executants') favour, we, the executants, in that case, will be competent to alienate the same with us; otherwise we will

> not be competent to alienate the said property till the expiry of the said limitation."

38. The rent deed executed by Lal Chand contained the following words : -

> "The house tax shall be payable by the owners of the property and the water and cantonment tax will be paid by me (the executant). Repairs of all kinds shall be got effected by the proprietors. I, the executant, will not be competent to get any repairs undertaken."

39. The Court concluded that from the bare perusal of the language of these three documents that it cannot be spelled out that the transaction was a mortgage and not a conditional sale. The Division Bench explained in para. 33 to 36 as under : -

> "33. The basic distinction between a "conditional mortgage" and a "conditional sale" is that "mortgage" leaves title to property, in the grantor and gives to the grantee only a lien on it, by means of which the grantee is authorised to appropriate the property mortgaged to the extent of its value, to payment of the debt thus secured. The "conditional sale" confers on the grantee title to the property giving the grantor the right to repurchase it at a certain price within the sated period. The effect of a mortgage is to charge the moneys secured upon the mortgaged property and to make it answerable of the repayment of such moneys. The right of redemption is an essential and inseparable attribute of a mortgagor. The well-known maxim "Once a mortgage always a mortgage, and nothing but a mortgage", is a recognition of the principles that right to redeem is an essential right of the debtor who offers his property by way of security and this right inheres in every transaction by way of mortgage. On the other hand, if the transaction is by way of sale but a right of repurchase within the limited time is reserved to the vendor, it is not a mortgage, and the

grantee's title become absolute if the condition as to repurchase is not complied with and in such a case no question of redemption can arise: vide Coote on Mortgages (ninth edition) pages 11 and 13; and Knox v. Brown, 16 S. W. (2d) 262.

34. A deed which is absolute on its face carries a presumption that it is an absolute conveyance and not a mortgage, but a presumption, which is rebuttable on proof of clear and convincing evidence, that it is intended as a mortgage. The party which alleges that an instrument absolute on its face, was in reality intended as a mortgage, has to discharge the burden of proving such an allegation; and the Courts insists on a clear, unequivocal and satisfactory proof for rebutting the presumption. In all such cases the burden of overcoming such a presumption raised form the terms of the written instruments rests upon the moving party, vide Howland v. Blake, (1877) 24 Law Ed 1027: 97 U.S. 624.

35. Where the transaction is essentially a mortgage, or, an absolute sale with a condition of repurchase, the courts try to find out the intention of the parties at the inception of the transaction. The original intention and meaning determine the nature of the transaction. If the real purpose of the transaction is to secure a debt it will be deemed a mortgage rather than a conditional sale. As the line of demarcation between a mortgage and a sale with a right to repurchase, is obscure, it usually is a matter of considerable perplexity to determine to which category the given transaction, very often nebulous, belongs. In so far as the intention of both the parties, at the execution of the deed, is a determining factor, the courts have formulated certain tests by no means inflexible or conclusive to help in arriving at the truth.

36. The first principle of ascertaining parties' intention as to whether an instrument is a conditional sale or a mortgage is that the Courts should look more to the substance than to the form of the transaction. It is not infrequent that a transaction of mortgage in substance, is disguised as one of ostensible sale. In such a case, the

> grantor is not estopped from showing the true nature of the seeming sale, and the form of the deed is not in itself conclusive as often the form is used as a cover designed to veil the reality. If the transaction of ostensible sale is a mere device or a cloak to conceal loan secured by mortgage, the Courts will disregard the cloak and look at the real transaction. In other words the Courts should not content themselves by merely looking to the deed but they should look through it in order to ascertain whether the real nature of the transaction has been disguised by giving it form and an appearance which is contrary to what it actually is, vide Re. Watson: Ex parte Official Receiver in Bankruptcy. (1890) 25 QBD 27; Madell v. Thomas and Co., (1891) 1 QB 230 (233), Conway v. Alexander, (1856) 3 Law Ed. 321, (328, 329) per Marshall, C. J.; and Teal v. Walker, (1883) 28 Law Ed, 415 (417)."

40. In *Lal Chand* case, this Court indicated the principles, the existence of which will tend to show that the transaction was a sale but they cannot be treated as decisive tests. The Court held as follows : -

> "(i) Where the intention is to extinguish a debt the transaction will be a sale and not a mortgage.
>
> (ii) By subsequent acts or admission of the parties the original character of the transaction cannot be changed, but such acts and admissions may be indicative of a pre-existing intention a concerning the nature of the transaction. For instance, where the grantor having taken lease of the premises from the grantee, later on, surrenders possession, or is the time fixed for repurchasing to expire, such a conduct would be evidence of the transaction being a conditional sale and not a mortgage: vide Jones on Mortgages, Volume I, page 412. This has happened in this case.
>
> (iii) Payment by the grantee of taxes, which are usually payable by the owner, indicates that he regarded himself as owner and this negatives the idea of a mortgage. Under the terms of the rent deed in this case the defendants had to pay the house tax.

> (iv) Lapse of considerable time during which the grantee has been in possession as ostensible owner of the estate and particularly after the expiration of the time given for repurchase, will lead the Court to treat the transaction as a safe, vide Tull v. Owen, (1840) 9 LJ Ex 33.

41. In concluding, the Court held that the plaintiff had brought the suit nearly 12 years after the transaction had been entered into and more than 10 years after Lal Chand had forfeited his right to repurchase property which cannot be easily brushed aside. The intention of the parties was gathered from the words used in the three documents but the court remarked that the matter of discovering the unexpressed intention of the parties particularly after lapse of a long time is a difficult and an elusive pursuit. The aforesaid tests were applied and on them it was found that the intention of the parties to perpetuate relationship of debtor and creditor is usually treated as a crucial test but such an intention is not in sync with the facts and circumstances of *Lal Chand*'s case. These do not warrant a conclusion which the plaintiffs rely before the Bench to draw the concomitant features which do not justify an interference that the transaction was not of sale which it purported to be but actually of a mortgage. The sale was confirmed. The intention of the parties was one of unconditional sale and the plaintiff could not recover property by way of redemption. The appeal was dismissed on Hon. Shamsher Bahadur, J. agreed.

42. There is another case law which needs to be noticed. In **Tamoli Ramanlal Motilal** v. **Ghanchi Chimanlal Keshavlal (dead) by Legal Representatives;** AIR 1992 SC 1236 : 1993 (Supp) SCC 295, the Supreme Court considered the distinction between mortgage by conditional sale and

sale with an option to re-purchase. The Supreme Court held that the distinction cannot be based merely on the nomenclature of the document which is not conclusive. Importance cannot be attached to the nomenclature alone since it is the real intention which is required to be gathered from the terms of document to decide the nature of the transaction. The right of redemption and foreclosure are co-extensive. In the absence of such a right of the mortgagee could only mean that it is a conditional sale. Para. 16 of the text is reproduced for ready reference : -

> "The property is sold conditionally for a period of five years and possession is handed over. At the same time, the document proceeds to state
>
> "Therefore, you and your heirs and legal representatives are hereafter entitled to use, enjoy and lease the said houses under the ownership right."
>
> It is this distinguishing point which has to be borne in mind because an argument was levelled that in Chunchun Jha's case (supra) also there was a clause transferring possession. But in this case the enjoyment by the transferee has to be under the ownership right. That makes all the difference.
>
> The further clause in the document is to the effect that the executant shall repay the amount within a period of five years and in case he fails to repay neither he nor his heirs or legal representatives will have any right to take back the said properties. Here only the right of the transferor is emphasised, while the right of the transferee to foreclose the mortgage is not spoken to. That would be so, if the document were to be a mortgage by conditional sale. Only in such a case the first condition spoken to under Section 58 (c) will come into play. It is well-settled in law that the right of redemption and foreclosure are co-extensive. The absence of such a right of the mortgagee could only mean that it is a conditional sale."

43. The Court relied on its earlier dicta in *Pandit Chunchun Jha* [supra]. The Court returned two observations of Hon. Bose, J. in *Pandit Chunchun Jha* and outlined the question raised which was required to be

settled, which was: -

> "The deed purports to be a sale and has the outward form of one but at the same time it calls itself a "conditional sale". It has, however, no clause for retransfer and instead says (Clause 6) that if the executants pay the money within two years, the property "shall come in exclusive possession and occupation of us, the executants". That is clear about the possession but is silent about the title. In the context we can only take these words to mean that if there is payment within the specified time, then the title will continue to reside in the executants; for what else can a right of exclusive possession import in these circumstances?

44. Still further, reference can also be had to **Parmar Kanaksinh Bhagwansinh [dead] by L.Rs** v. **Makwana Shanabhai Bhikhabhai;** (1995) 2 SCC 501 in the analysis of the merger of lease hold right of mortgage and the distinction between the mortgage by conditional sale and other mortgages. The Court dealt with the situation where there was a lease of property executed and the mortgage was taken of the same property from the landlord and thus, the intention of surrender of tenancy could not be attributed to the tenant.

45. In case of serious doubt as to the express words used in a document after the amendment to TPA, 1882 when a person did not choose to use two documents, intending transaction to be a sale, unless they displace presumption by clear and express words; and if the conditions of Section 58(c) are fulfilled, the deed should be construed as a mortgage. If only possession is delivered and there is nothing in the deed which indicates the intention of the parties and the transferor intended to transfer ownership rights in the property, then it cannot be said to be a sale deed or absolute

sale deed with agreement to repurchase. The suit then would be governed by Article 61 (a) of the Limitation Act. This view is of the learned Single Judge of the Karnataka High Court in **B. Jayashankarappa and others** v. **D.S.Gulwadi;** AIR 2000 Karnataka 359. The Court asserted in para. 16 as follows : -

> "A reading of Section 58 per se shows that a mortgage no doubt is a transfer, but not the transfer of ownership rights and in this respect, it differs from sale. A mortgage is said to be transfer of 'an' interest in a specific immoveable property. The purpose of mortgage is said to secure the payment of money advanced as loan, an existing or future debt. In a sale, all rights of ownership, the transferor is possessed of, in the property, pass on by transfer to the transferee. In a mortgage some right is transferred to the mortgagee while some others remain with the mortgagor. This is one of the basic difference between a sale and a mortgage. A reading of clause (c) of Section 58 further reveals that in case of mortgage by conditional sale there is an ostensible sale and it is conditional. A reading of these two provisions leads to the conclusion that if a document prima facie does not show and express any transfer of ownership but only indicates transfer of certain interests for securing the money, it may not be said to be sale. The proviso to Section 58(c) further reveals that a transaction ostensibly of sale with either or any of the conditions as enumerated in clause (c) is not to be considered as a mortgage by conditional sale, unless and until the conditions concerned as to reconvey etc., is embodied in the document itself which effects or purports to effect the sale. It means that if in case of a transaction of ostensible sale the condition to repurchase or reconveyance for the price or the like is imposed by a deed other than the deed of ostensible sale, then a contract of that nature is not to be considered or deemed to be mortgage by conditional sale, instead it has always to be deemed and considered to be an out and out sale with an agreement to repurchase."

46. On the same lines is the decision of the Andhra Pradesh High Court in **Mohammed Shafeeq Ahmed** v. **Sahebzada Mir Tilamat Ali Khan;** 2007 (59) AIC 605 : 2007 (5) Andh LD 546 accessible on Law Finder (Library Edition).

47. Further to the debate on the point in issue, the judgments cited by Mr. Pritam Saini are noticed but are of no moment. These are: **P.L.Bapuswami** v. **N.Patty Gounder;** 1966 (2) SCR 918, **Tulsi and others** v. **Chandrika Prasad & others;** (2006) 8 SCC 322, **Raj Kishore (Dead) by LRs** v. **Prem Singh and others;** (2011) 1 SCC 657. These judgments are on the point of distinction between conditional sale or a sale with condition of re-transfer and are useful only when there is a doubt in the documents which is claimed as one of conditional sale falling in Section 58(c) of the Transfer of Property Act, 1882. The present deed cannot be described as of sale with condition of re-transfer of mortgaged property.

48. These decisions accordingly would be of no constructive help in the facts of the present case when the documents speak loud and clear that the present is a case falling under Section 58(c) TPA, 1882. The lower Appellate Court thus committed no error in holding as much though without a detailed analysis of the moot issue in the light of the past precedents which all point in favour of the conclusion reached that the appeal must fail. Therefore, there is no life in this second appeal which, similarly, deserves to be declined.

49. As a result of the discussion, and for the variety of reasons recorded above, the substantial question of law framed in paragraph 1 (supra) is answered accordingly in the affirmative in favour of the

respondents and against the appellants and the appeal is commended not to be accepted as the appellate decree deserves to be affirmed for reasons recorded in this order. No other arguments were pressed other than the one noticed and dealt with hereinbefore.

50. Ordered: appeal to stand dismissed without any order as to costs in the present appeal.

(RAJIV NARAIN RAINA)
JUDGE

September 16, 2015
Paritosh Kumar