IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH.

Regular Second Appeal No.2361 of 2011 (O&M)
Date of Decision: August 14, 2015.

Ved Parkash

..........APPELLANT(s).

VERSUS

Rattan Lal Aggarwal and others

........RESPONDENT(s).

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. Anil Kshetarpal, Senior Advocate with
Ms. Piyush Aggarwal, Advocate
for the appellant (s).

Mr. Arun Jain, Senior Advocate with
Mr. Sunil Sharma, Advocate
for the respondents.

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SURINDER GUPTA, J.

Appellant-plaintiff Ved Parkash filed suit seeking relief of declaration and injunction as follows:-

> "(i) that the plaintiff has become owner of land measuring 29 kanals 17 marlas comprised in khewat/khatauni No.392min/522, 529; 456/622, khasra Nos .100/64, 60, 46, 50, 56, 58, 59, 66, 70 situated within the revenue estate of village Jagadhari HB No.400 according to Jamabandi for the year 1989-90 alongwith all constructions and super-structures raised thereon and;
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> (ii) that judgment and decree obtained by defendant Nos.10 and 11 against defendant Nos.1 to 9 in respect of land measuring 16 marlas out of khasra

Nos.100//46, 100/60 in Civil Suit No.272 of 1995 titled as "Hari Chand etc. Vs. Rattan Lal etc.", decided by the Court of Shri M.C. Mehra, Additional Civil Judge (Senior Division), Jagadhari on 24.07.1995 are null and void and ineffective, against the rights of the plaintiff and are not binding upon the plaintiff and;

(iii) that sale deed dated 5.4.1995 executed by the defendant Nos. 1 to 8 in respect of land measuring 1 kanal 6½ marlas comprised in khewat/khatauni No.456/622, khasra Nos. 100/56, 58 situated within the revenue estate of village Jagadhari, HB No.400, according to jamabandi for the year 1989-90 in favour of defendant No.12 and subsequent mortgage created by defendant No.12 in favour of defendant No.13 are null and void and in effective and not binding upon the plaintiff and;

(iv) Consequently for Mandatory Injunction directing the defendants to hand over actual physical possession of the land detailed and described in the head note (i) above and also for recovery of mesne profits for the land in dispute @ Rs.30,000/- per year from the date of filing of the suit till recovery of actual physical possession thereof from the defendants."

Civil Judge, Jagadhari dismissed the suit holding that the mortgage created vide mortgage deed dated 17.10.1963 executed by the original owner Tek Chand and registered on 19.10.1963 was usufructuary mortgage and there is no time limit for its redemption. Appellant-plaintiff filed appeal which was dismissed by Additional District Judge, Yamuna Nagar at Jagadhari upholding the finding of the lower Court. It was observed that the mortgage deed dated 17.10.1963 Ex.P2 was not duly proved.

Against the concurrent judgment of both the Courts below, the appellant-plaintiff has filed instant regular second appeal.

Learned counsel for the appellant-plaintiff has argued that mortgage deed dated 17.10.1963 registered on 19.10.1963 was duly proved by leading secondary evidence. The appellant-plaintiff himself appeared as PW1 and has stated that this mortgage deed was executed by Tek Chand in his presence. The scribe and deed writer have died, as such, could not be examined. The testimony of Surajbhan, who had identified the signature of one marginal witness has been discarded on the ground that he could not give the basis for identifying the signatures of witness Bagga Ram. Certified copy of mortgage deed was produced on the file as Ex.P2. The recital in the mortgage deed shows that the personal liability of the mortgagor was fixed in the event of the rental amount falling short of the mortgage amount and the mortgagee was allowed to recover the same from personal and other properties of the mortgagor. Relying on the observations in case of ***Lachhman Singh Vs. Natha Singh through Harnam Singh and others, AIR 1940 Lahore 401***, learned counsel for the appellant-plaintiff has argued that where the mortgagor has personal liability to repay the mortgage amount, it does not fall in the category of usufructuary mortgage.

Perusal of the mortgage deed Ex.P2 clearly shows that the mortgage was created for a sum of ₹5,000/-. The possession of the mortgage property was given to the mortgagor. As per term of the mortgage deed Ex.P2, the rent of the property was to be appropriated towards the interest on the mortgage money and any benefit or loss in this regard was to be borne by mortgagor. He had also taken responsibility to carry out required repair. The mortgagor was entitled to get the land redeemed on payment of entire mortgage money. The mortgagor also took the liability to pay the rent if the property remained with him as tenant and undertook to pay the amount of rent and mortgage money.

Section 58(d) of Transfer of Property Act, 1882 defines 'usufructuary mortgage' as follows:-

> "Usufructuary mortgage.--Where the mortgagor delivers possession [or expressly or by implication binds himself to deliver possession] of the mortgaged properly to the mortgagee, and authorises 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 an usufructuary mortgage and the mortgagee an usufructuary mortgagee."

Though the above provisions are not applicable to the State of Punjab but the definition of various kinds of mortgage given under Section 58 of the Transfer of Property Act are already accepted as correctly describing their essential ingredients and incidence. While defining the characterstics of usufructuary mortgage, the Full Bench in case of ***Lachhman Singh (supra)*** has observed as follows:-

> "It will be seen that the characteristics of a usufructuary mortgage, as define above, are :(1) that the possession of the mortgaged property is delivered, or agreed to be delivered, to the mortgagee; (2) that he is to

> appropriate the rents and profits either (a) in lieu of interest, or (b) towards the principle, or (c) partly in lieu of interest and partly in payment of the principle; (3) that in none of these cases the mortgagor incurs any personal liability to repay; and (4) as the mortgagor has not bound himself to repay (but may repay if and when he chooses) there can be no 'forfeiture' and therefore the remedies by way of foreclosure or sale are not open to the mortgagee."

Applying the above test to the nature of mortgage created vide mortgage deed Ex.P2, it is clear that it was usufructuary mortgage. The possession of the mortgaged property was given to the mortgagee and he was also given right to receive the rental of the mortgaged property. As per the term of the mortgage deed, the interest on the mortgage amount was to be defrayed from the rental of the mortgaged property and any profit or loss in this regard was to be borne by mortgagee.

In view of the above terms, no other conclusion can be drawn except that the mortgage created vide mortgage deed Ex.P2 was usufructuary mortgage. It is not disputed that as per the law laid down by Hon'ble Apex Court in case of ***Singh Ram (D) through LRs Vs. Sheo Ram and others*** **2014 AIR (SC) 3447,** right of usufructuary mortgagor to recover the possession commences when the mortgage money is paid or tendered to the mortgagee or deposited in the Court. Full Bench of this Court in case of ***Ram Kishan and others Vs. Sheo Ram and other (2008-1) Punjab Law Reporter page 1*** has observed that a usufructuary mortgage is always redeemable and Hon'ble Apex Court has affirmed this observation in appeal titled as ***Singh Ram (D) through LRs(supra).***

I find no legal or factual infirmity in the conclusion drawn by both the Courts below holding the mortgage as usufructuary mortgage.

The first appellate Court has discarded the mortgage deed with the observation that it is not a duly proved document.

In order to prove the mortgage deed Ex.P2, plaintiff himself appeared as PW1 and has also examined PW4 Surajbhan, who identified the signatures of one of the marginal witness namely Bagga Ram. Plaintiff himself has stated specifically that deed writer and marginal witness of mortgage deed have already died. The mere fact that he did not produce on record the death certificates of deed writer and marginal witness, particularly when the respondents-defendants have not come up with any plea that the aforesaid persons were alive, the above observations of first appellate Court are perverse and are set aside.

No substantial question of law requiring determination arises in this appeal, which has no merits. Dismissed.

(SURINDER GUPTA)
JUDGE

August 14, 2015.
Sachin M.