

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

**RSA No. 376 of 1988 (O&M)**  
**Date of Decision : 21.04.2016**

Dharam Kaur and others

....Appellants

Versus

Mohinder Singh and others

....Respondents

**CORAM: HON'BLE MR. JUSTICE SURINDER GUPTA**

Present: Mr. S.K. Garg Narwana, Senior Advocate with  
Mr. Naveen Gupta, Advocate  
for the appellants.

Ms. Alka Sarin, Advocate  
for the respondents.

**Surinder Gupta, J.**

This is second appeal against judgment and decree passed by then Sub Judge, Ist Class, Jhajjar, whereby suit filed by plaintiffs Mohinder Singh and others (now respondents in this appeal) was decreed for declaration that they have become “owner of land in dispute due to lapse of period of limitation for seeking redemption of its mortgage”. First appeal filed by defendants was dismissed by Additional District Judge, Rohtak.

2. Case of plaintiffs, in brief, is that Chhailu son of Kurdiya resident of village Silana (predecessor-in-interest of appellants) mortgaged suit land to Khem Chand son of Teku, predecessor-in-interest of plaintiff-respondents and a mutation in this regard bearing No. 528 dated 28.06.1899 was sanctioned. The land was got redeemed and after lapse of 30 years, plaintiffs have become owners of suit land by foreclosure.

3. Defendants-appellants denied possession of plaintiffs over suit land and their plea that they have become its owner by

lapse of time.

4. Pleadings of parties led to framing of the issues as follows:-

- (i) Whether plaintiffs who were earlier mortgagees in possession, became its owner by lapse of time of the land in suit? OPP
- (ii) Whether the suit is not maintainable in the present form? OPD
- (iii) Whether the plaintiffs have no *locus standi* to file the present suit? OPD
- (iv) Whether the plaintiffs are estopped by their own act and conduct from filing the suit? OPD
- (v) Relief.

5. Learned Sub Judge, Ist Class, Jhajjar recorded finding on issue no. 1 that under Article 61 (A) of the Limitation Act, 1963 (later referred to as 'the Act of 1963') the right to seek redemption has stood extinguished, as such, plaintiffs have become owners of suit land. The plea raised by defendants-appellants that mortgage was a usufructuary mortgage, as such, there is no period of limitation to seek its redemption was discarded.

6. Regarding possession over suit land, it was conceded during arguments by counsel for defendants-appellants before learned Sub Judge, Ist Class that defendants are in its possession as mortgagees.

7. Ist Appellate Court affirmed finding of learned Sub Judge, Ist Class with the observations that land is under

possession of plaintiffs but discarded the plea raised by defendants that mortgage is a usufructuary mortgage.

8. Learned counsel for appellants has argued that both the Courts below have recorded findings against law that the mortgage in favour of plaintiffs was not an usufructuary mortgage. It was an oral mortgage accompanied with delivery of possession as alleged by plaintiffs in para 2 of the plaint. As per mutation No. 528 dated 28.06.1899, rent/profit of the land shall be treated as equal to interest. As per definition of usufructuary mortgage under Section 58 (d) of the Transfer of Property Act, 1882 (later referred to as 'the Act of 1882'), mortgage falls under the category of usufructuary mortgage. The plea raised by defendants-appellants that they are in possession of suit land was given up before learned Sub Judge, Ist Class, as such, plaintiffs-respondents cannot take any benefit of that plea. In the event of plea of defendants that they are in possession of suit is accepted, the suit is not maintainable as plaintiffs have not sought possession of suit land. In this regard reliance has been placed on the observations of this Court in the case of **Devi Lal vs. Shokaran and another, 2011 (2) PLR 787.**

9. Learned counsel for plaintiffs-respondents has argued that the mortgage in this case was oral mortgage, which was legal and valid mortgage. This mortgage cannot be termed as usufructuary mortgage on two counts. Firstly, as per plea raised by defendants they are in possession of suit land and this means that they do not admit the delivery of possession to mortgagees; and secondly, as per term of mortgage mentioned in mutation,

rent/profit of the land was to be utilized towards interest of mortgaged land, but to draw inference of usufructuary mortgage, it was required that income/rent/profit from the land should have been utilized towards interest accruing on the mortgage amount and also towards payment of the mortgage amount. She has placed reliance on the observations in the case of **Sampuran Singh and others vs. Niranjan Kaur (Smt.) and others, 1999 (2) SCC 679** and **Shri Chand and others vs. Nathi, 1983 (PLR) 288 (Punjab and Haryana High Court Full Bench)**.

10. The substantial questions of law which arise for consideration in this appeal are as follows:-

- (i) Whether mortgage in favour of predecessor-in-interest of plaintiffs was an usufructuary mortgage? and
- (ii) if mortgage created by predecessor-in-interest of appellants is held to be usufructuary mortgage, whether plaintiffs have become owner of the suit land by foreclosure?

11. Before proceeding further it will be appropriate to take a note of the definition of usufructuary mortgage as given in Section 58 (d) of the Act of 1882, which reads as follows:-

**“58. “Mortgage”, “mortgagor”, “mortgagee”,  
“mortgage-money” and “mortgage-deed” defined -**

- |     |    |    |    |    |
|-----|----|----|----|----|
| (a) | xx | xx | xx | xx |
| (b) | xx | xx | xx | xx |
| (c) | xx | xx | xx | xx |

(d) **Usufructuary mortgage** – Where the mortgagor delivers possession for 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 an usufructuary mortgage and the mortgagee an usufructuary mortgagee.”

12. Full Bench of this Court in the case of **Ram Kishan and others vs. Sheo Ram, 2008 (1) PLR 1** discussed characteristics of usufructuary mortgage in para 14 as follows:-

“14. With the said comments of the leading commentators on the subject, we revert to precedents on the subject. A Full Bench of the Lahore High Court in **Lachhman Singh's case (supra)**<sup>1</sup> has delineated the characteristics of an usufructuary mortgage as under:

“It will be seen that the characteristics of a usufructuary mortgage, as defined above, are: (1) that the possession of the mortgaged property is

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<sup>1</sup> *Lachhman Singh vs. Natha Singh through Harnam Singh, AIR 1940 Lahore 401*

*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 principal, or (c) partly in lieu of interest and partly in payment of the principal; (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.*

*Thus, any personal liability on the part of mortgagor is excluded in case of usufructuary mortgage and a usufructuary mortgagee is not entitled to sue for sale of the property. If there is any stipulation to the contrary, the transaction ceases to be one of usufructuary mortgage and is described as anomalous mortgage. The Court proceeded to hold as under:-*

*"As stated in (2) above, usufructuary mortgages are of three kinds. Of these, the two described in (b) and (c) are self redeeming; the mortgagee has to look to the rents and profits only to re-pay himself and when his entire charge is so liquidated he must re-deliver possession of*

*the mortgaged property to the mortgagor free from all encumbrances.”*

xxx                      xxx                      xxx                      xxx

*“The most common form of usufructuary mortgage however is that described in 2(a) above, and it is to this class that the mortgages in the cases before us belong. Here the rents and profits are to be set off against interest and the mortgagee is entitled to retain possession until such time as the mortgagor chooses to redeem on payment of the principal sum secured. This form of mortgage has been in vogue in India since ancient times. It was known to the Hindu lawyers under the expressive name of bhog bandakam which literally means "mortgage (bandaka) by enjoyment (bhog)." It was a mortgage for an indefinite period, during which the mortgagee enjoyed the usufruct and the mortgagor was entitled to redeem at any time on payment of the principal. It retained its popularity during the Mughal period, especially among the Mohammedan creditors who by obtaining possession of property (as zer-i-peshgi lessee and under other similar names) and appropriating the rents and profits till redemption, could find a safe investment for their money without charging*

*interest. The Court concluded to the following effect:-*

*“It will be clear from the foregoing discussion that the principal characteristics of a usufructuary mortgage are that there is no personal liability of the mortgagor to pay, nor has the mortgagee a right to have the mortgaged property brought to sale.”*

*xxx xxx xxx xxx*

*Judged in this light, it must be conceded that a usufructuary mortgagor is under no liability to mortgagee. He is under no legal obligation to pay; it is his option to redeem, if and when he chooses....”*

13. It is clear from the definition of usufructuary mortgage that when the mortgagor has delivered possession of the mortgage-property to the mortgagee and authorized him to retain such possession until payment of the mortgage money, and to receive the rent/profit accruing from the property and to appropriate the same in lieu of (i) interest; or (ii) payment of mortgage money; or (iii) partly in lieu of interest or partly in payment of mortgage money, the transaction is called an usufructuary mortgage.

14. Ist Appellate Court has taken note of this definition and reproduced the same in para 6 of the judgment but has gone astray while applying the principles of usufructuary mortgage to the facts and circumstances of the present case.

15. The mortgage in this case was oral mortgage. As per citations relied upon by learned counsel for the respondents in the cases of **Sampuran Singh (supra)** and **Shri Chand (supra)**, oral mortgage is valid mortgage. Learned Ist Appellate Court has also taken note of the mutation pertaining to this mortgage which was sanctioned in the year 1899 and has reproduced the same in para 6 of the judgment as follows:-

“       xx               xx               xx               xx               xx

*The land stands mortgaged with Khem Chand son of Teku. The condition of the mortgage is that if in the beginning of the year in the month of Jeth, the mortgage money is paid off, the land shall stand redeemed. During the mortgage, the rent and the profits shall be treated as equal to interest. The payment of land revenue shall be the responsibility of the mortgagee.”*

16. Applying the above terms of mortgage to facts of the present case, it is apparent that mortgage created by predecessor-in-interest of defendants-appellants was an usufructuary mortgage. Admittedly, appellants were delivered possession of suit land and were also made liable to pay the land revenue. In paras 2 and 4 of plaint, plaintiffs have specifically averred that they are in possession of suit land. Admission if true and clear, are by far the best proof of the facts admitted. The Apex Court while elaborating this fact has observed in the case of **Nagiadas Ramdas vs. Dalpat Ram Ichharam etc.,** **1974 Current Law Journal 57** as follows:-

“26. From a conspectus of the cases cited at the bar, the principle that emerges is, that at the time of the passing of the decree, there was some material before the Court, on the basis of which, the Court could be *prima facie* satisfied, about the existence of a statutory ground for eviction, it will be presumed that the Court was so satisfied and the decree for eviction, though apparently passed on the basis of a compromise, would be valid. Such material may take the shape either of evidence recorded or produced in the case, or it may partly or wholly be in the shape of an express or implied admission made in the compromise agreement, itself. Admissions, if true and clear, are by far the best proof of the facts admitted. **Admissions in pleadings or judicial admissions, admissible under Section 58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof.** They by themselves can be made the foundation of the rights of the parties. On the other hand evidentiary admissions which are

*receivable at the trial as evidence, are by themselves, not conclusive. They can be shown to be wrong.”*

17. During course of arguments before learned Sub Judge, Ist Class, Jhajjar, it was conceded by learned counsel for defendants (now appellants) that plaintiffs being mortgagees are in possession of suit land. Learned Sub Judge, Ist Class also recorded the finding that the land is under possession of plaintiffs (now respondents), who are getting the same cultivated through their tenants.

18. The above observations were never challenged by plaintiffs-respondents. Though defendants-appellants have raised the plea that they are in possession of suit land, the same was given up and they conceded the possession of plaintiffs over suit land.

19. For the sake of arguments, if this plea of plaintiffs be believed that they were not delivered possession of suit land, this will be more damaging and the suit filed by them will be rendered not maintainable as they have not sought relief of possession of suit land. Similar were the observations in the case of ***Devi Lal (supra)***.

20. From the above discussion it is clear that possession of mortgage land was delivered to mortgagees. It is also clear from the terms recorded in mutation that rent/profit from the land shall be treated as equal to interest of mortgage money. This also met with condition mentioned in Section 58 (d) of the Act of 1882 to term the mortgage in question as usufructuary

mortgage. It is not one of the requirements in order to create a usufructuary mortgage that the rent/profit from the mortgage property should be utilized towards both i.e. payment of interest and for payment of mortgage money. Section 58 (d) of the Act of 1882 requires that rent and profit accruing from the mortgage property are agreed to be appropriated either in lieu of interest, or in payment of mortgage money. The word used here is 'or' and not 'and' so as to support the plea raised by learned counsel for the respondents that rent and profit of the mortgage property should have been agreed to be appropriated in lieu of interest and mortgage money. Ist Appellate Court has also observed that as per term contained in the mutation, the mortgage was not a self liquidating mortgage. The Apex Court in para 17 of the judgment in the case of **Singh Ram (dead) through Legal Representatives vs. Sheo Ram and others, 2014 (9) SCC 185** has taken note of the statutory provisions having regard to the leading features of usufructuary mortgage as discussed in the case of **Achal Das Durgaji Oswal vs. Ramvilas Gangabisan Heda, 2003 (3) SCC 614**, which reads as follows:-

“xx                      xx                      xx                      xx                      xx

20. *The statutory provisions, as noticed hereinabove, are required to be construed having regard to the redeeming features of usufructuary mortgage, namely, (a) there is a delivery of possession to the mortgagee, (b) he is to retain possession until repayment of money and to receive rents and profits or part thereof in lieu of interest, or in*

*payment of mortgage money, or partly in lieu of interest and partly in payment of mortgage money, (c) there is redemption when the amount due is personally paid or is discharged by rents or profits received, and (d) there is no remedy by sale or foreclosure.”*

21. In the instant case, possession of mortgage land was delivered to mortgagee which he was entitled to retain till repayment of mortgage money. He was also authorized to receive rent/profit in lieu of interest and no remedy by sale or foreclosure was allowed.

22. In view of above facts and circumstances, arguments of learned counsel for the plaintiffs-respondents that appellants in para 2 of the written statement pleaded that they are in possession of suit land and secondly, that rent/income from the suit land was not agreed to be appropriated towards interest on the mortgage money and towards payment of mortgage money both, as such, mortgage in question was not a usufructuary mortgage, has no legal basis and are discarded. Consequent upon my discussion above, mortgage created by predecessor-in-interest of appellants, the terms of which find mention in mutation No. 528 dated 28.06.1899, was a usufructuary mortgage. It is a settled proposition of law as approved by the Apex Court in the case of **Singh Ram (supra)**, that an usufructuary mortgagee is not entitled to file a suit for declaration that he has become an owner merely on expiry of 30 years from the date of mortgage and there is no time limit to seek

redemption of usufructuary mortgage.

23. As a sequel of my above discussion, both the points for determination are answered in favour of appellants and against the respondents. This appeal has merit and the same is accepted. The judgment and decree passed by Courts below are set aside and suit of plaintiffs is ordered to be dismissed.

24. Keeping in view the facts and circumstances of this case, parties are left to bear their own costs.

**April 21, 2016**  
jk

**( SURINDER GUPTA)**  
**JUDGE**

***Whether to be referred to the Reporters?      Yes/No***