IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.282 of 2007 (O&M)
Date of Order:19.02.2020.

Lakhi (since deceased) through his LRs and others

..Appellants

Versus

Brahma and others

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Amit Jain, Advocate, for the appellants.

Ms. Heena Verma, Advocate, for
Mr. Ashish Kapoor, Advocate,
for respondent no.8.

ANIL KSHETARPAL, J(Oral)

The plaintiffs-appellants have filed regular second appeal against the finding of fact arrived at by the learned first appellate court while dismissing their suit for grant of declaration that they have become owners on account of lapse of time as the defendants failed to redeem the mortgage dated 28.10.1940.

The defendants contested the suit and pleaded that they are in possession of the property and the mortgage deed was only a paper transaction.

Learned trial court on appreciation of the evidence decreed the suit while recording a finding that since 30 yeas have elapsed, the plaintiffs are entitled to declaration as prayed for.

Before the first appellate court, counsel for the plaintiffs took a stand that the mortgage was a usufructuary mortgage. Learned first appellate court found that the mortgage was an usufructuary mortgage but since the possession was delivered back by the mortgagees to the mortgagors, therefore it became simple mortgage, consequently, the appeal filed by the defendants was accepted.

This court has heard learned counsels for the parties at length and with their able assistance gone through the judgments passed by the courts below.

Usufructuary mortgage is defined in Section 58(d) of Transfer of Property Act, 1882, which is extracted as under:-

> ***Section 58***
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> *58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgage-deed" defined.—*
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> *(a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.*
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> *(b)* ***Simple mortgage.****—Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.*
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> *(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 mortgagee by conditional sale: 1[Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.]*
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> *(d)* ***Usufructuary mortgage.****—Where the mortgagor delivers possession 1[or expressly or by implication binds himself to deliver*

> *possession] of the mortgaged property 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 2[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 3[or] partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.*
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> *(e)* ***English mortgage.****—Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.*
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> *(f)* ***Mortgage by deposit of title-deeds****.—Where a person in any of the following towns, namely, the towns of Calcutta, Madras, 5[and Bombay], 6[* * *] and in any other town7 which the 8[State Government concerned] may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immoveable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.*
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> *(g)* ***Anomalous mortgage****.—A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage."*

On careful reading of the deed of mortgage dated 28.10.1940 , which is a registered document, it is explicitly clear that the possession of the land was handed over by the mortgagor to the mortgagees and interest on the amount of mortgage was equivalent to the use and occupation of the land. The deed of mortgage did not prescribe any period for redemption of the mortgage. Thus, the mortgage fell within the definition of usufructuary mortgage as defined in clause (d) of Section 58.

In view of larger bench judgment of the Hon'ble Supreme court in ***Singh Ram(D) through L.Rs vs. Sheo Ram and others, 2014(4) RCR (Civil)***, unless the period for redemption is prescribed/stipulated in case of an usufructuary mortgage, the limitation for redemption would not begin to run and reckoning date for calculating limitation cannot be calculated from the date of the mortgage. The limitation would begin to run from the date when the mortgagor pays or tenders the amount due to the mortgagee or deposits it in the Court.

Findings of the learned first appellate court that since there was no actual delivery of possession, therefore, the usufructuary mortgage stood converted into a simple mortgage or anomalous mortgage is not shown to be supported by any provision of the statute. Learned counsel for the parties also failed to draw attention of the Court to any such provision which converts an usufructuary mortgage to a simple or anomalous mortgage only because the possession was delivered back to the mortgagor before the redemption. On plain reading of Section 58(d) of the Transfer of Property Act, 1882, it is apparent that three different eventualities are provided with respect to delivery of possession. The words used are:-

> *"Deliver possession or expressly or by implication binds himself to deliver possession."*

Literal meaning of the aforesaid words include a promise to deliver possession. Hence, actual prior delivery of possession is not a sina-qua-non for creating an usufructuary mortgage. In the present case the plaintiffs have themselves pleaded that the time when the mortgage was created, the possession of the land was with them. In other words possession was delivered by the mortgagors to the mortgagees at the time of execution of the mortgage deed. Hence, the character of the mortgage would continue to be usufructuary mortgage even if subsequently the possession of the land mortgaged was delivered back to the mortgagor by the mortgagee or mortgagor took back the possession of the land mortgaged.

Keeping in view the aforesaid facts, the judgment passed by the learned first appellate court is upheld, of course, for different reasons.

In view thereof, there is no ground to interfere.

Dismissed.

February 19, 2020 **(ANIL KSHETARPAL)**
nt **JUDGE**

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No