

Appropriation of Rents and Profits: An Essential of Usufructuary Mortgage

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INTRODUCTION

Section 58 of Transfer of Property Act, 1882 defines mortgage and provides for six forms of mortgage. Usufructuary mortgage (UM) is defined in Section 8(d) of the Act. Two essentials of UM incorporated in the definition are that

1. the mortgagor must deliver possession or expressly or by implication bind himself to deliver possession and authorise the mortgagee to retain such possession until payment of the mortgage money and
2. authorise mortgagee to receive the rents and profits or any part thereof accruing from the property and to appropriate the same towards the payment of interest or mortgage money or partly in both.

Therefore, for a valid UM there has to be a rule of appropriation where some part of UMM should be appropriated from the rents and profits of the mortgaged land. The mortgagor himself does not remain personally liable to pay the mortgage money because mortgagee is permitted to repay himself out of the rents and profits of such property.

If any of these two conditions are missing from the mortgage-deed, it won't constitute UM and would fall into any other category of mortgage. If suppose mortgagee is put into possession of the land and there is a rule of appropriation where no part of the UMM is to be appropriated from the rents and profits of the mortgaged land, then it will be a CSM or EM, or some form of an AM but not UM.

FORMS OF MORTGAGES

Section 58 of Transfer of Property Act, 1882 defines mortgage and provides for six forms of mortgage. The essential characteristics of a mortgage as under Section 58(a) are:

1. Transfer of an interest;
2. Transfer in an specific immovable property; and
3. Transfer is to secure the payment of a loan or debt or the performance of an agreement that may give rise to pecuniary liability

If above conditions are satisfied, the transaction is mortgage irrespective of its form. If any of the above essentials is absent, the transaction will not be mortgage. Clause (a) of Section 58 gives the general principle as to what constitutes mortgage. This clause governs all other clauses of this section i.e. all the six forms of mortgage provided by this section are qualified by clause (a).

In order to establish the hypothesis it becomes imperative to first discuss the forms of mortgages under the Section.

Simple Mortgage(SM): Section 58(b)

The basic characteristics of simple mortgage are:

1. The mortgagor takes a personal obligation, express or implied, to pay the mortgage money;
2. Possession of the property mortgaged remains with the mortgagor; and
3. In the event of default in payment mortgagee shall have the right to cause the mortgaged property sold.

A simple mortgage with possession is a simple mortgage usufructuary or anomalous mortgage.¹

Mortgage by Conditional Sale (CSM): Section 58(c)

Essential elements of a mortgage by conditional sale are:

1. The mortgagor ostensibly sells the property mortgaged;
2. The sale is subject to the following conditions—
 - a. that on default of the payment of the mortgaged money on certain date, the sale shall become absolute; or
 - b. that on such payment being made, the sale shall become void; or

¹ Mulla, op. cit., p. 582

- c. that on such payment being made the buyer shall transfer the property to the seller;
3. The ostensible sale and the condition of re-transfer must be embodied in one and the same document (proviso to Section 58(c)).

The third element is the sine qua non of CSM². The sale being, merely an ostensible one, the mortgagor does not lose his title or interest or the right to possess the property. There is no personal liability on the part of the mortgagor to pay the debt.

English Mortgage (EM): Section 58(e)

The essential elements of English Mortgage are:

1. The mortgagor should bind himself to repay the mortgage money on a certain day;
2. That the property mortgaged should be transferred 'absolutely' to the mortgagee;
3. The absolute transfer should be made subject to a proviso that the mortgagee will retransfer the property to the mortgagor upon payment of the mortgaged money, on the date on which the mortgagor bound himself to repay the same.

The mortgagor takes the personal liability to repay the mortgage debt on a certain date. And under Section 69 of the Act, (2) the mortgagee has power, without the intervention of the Court to sell, or concur in selling the mortgaged property, or any part thereof, in default of payment of the mortgage-money.

The mortgagee acquires the right to take possession as soon as the mortgage is executed whether the right of entry is expressly covenanted or not and can retain the same till mortgage-money is paid to him.³ If the mortgagee allows the mortgagor to remain in possession, he holds possession merely as a tenant on sufferance and may be ejected, in the absence of a contract to the contrary. Under a mortgage in the form of an English mortgage, unless there is a contract to the contrary, the rents and profits arising out of the land form part of the property subject to the mortgage.⁴

Mortgage by Deposit of Title Deeds (MDTD): Section 58(f)

The essence of the mortgage by deposit of title deeds is the actual or constructive handing over by the borrower to the lender or his agent documents of title to immovable property "with the intention that those documents shall constitute a security" which will enable the creditor ultimately to recover the money he has lent. The delivery of the document should be done in a 'notified town' irrespective of the place where the property is situate.

The delivery of documents alone is sufficient to create a mortgage by deposit of title deeds under this Section. There is no necessity to execute any document.⁵ But once the bargain or contract is reduced to writing (constitutive memorandum) it must be registered.⁶

Section 96 of the Act provides that the provisions hereinbefore contained which apply to simple mortgage shall, so far as may be, apply to a mortgage by deposit of title deeds. The cases of a simple mortgage, or of a mortgage by deposit of title-deeds, in respect of the right to possession of the property or of the appropriation of the rents and profits of the property subject to the mortgage, stand on the same footing, unless an agreement to that effect is expressly made. Like a simple mortgagee, a mortgagee by deposit of title-deeds does not have the right to possession nor the right to rents and profits.⁷

Anomalous Mortgage (AM): Section 58(g)

Clause (g) enacts that a mortgage which does not fall within the definition of a simple mortgage, a mortgage by conditional sale, a usufructuary mortgage, an English mortgage or a mortgage by deposit of title deeds is an anomalous mortgage. The definition, therefore, includes:

1. All mortgages which fall within clause (a) but not in any of the clauses (b) to (f), and
2. Combinations of mortgages falling in clauses (b) to (g)

² Bishwanath Prasad Singh v Rajendra Prasad, (2006) 4 SCC 432

³ Venkataratnam v. Varahaliah, AIR 1932 Mad 768; Rukm ini Kanta v. Baldeo Das, AIR 1925 Cal 77 vide Transfer of Property Act, 1882 By Sanjiva Row commentary on www.manupatra.com

⁴ Ma Joo Tean v. Collector of Rangoon, AIR 1934 Rang 321 vide Transfer of Property Act, 1882 By Sanjiva Row commentary on www.manupatra.com

⁵ Mull op. cit., p. 608

⁶ Sailesh T. I. Surat v Chief Controlling Revenue Authority (SB), AIR 1994 Guj 153

⁷ Ram jon Yezdi v. Valthazar and Son Ltd., AIR 1936 Rang 290 vide Transfer of Property Act, 1882 By Sanjiva Row commentary on www.manupatra.com

Mortgages which are a combination of a simple mortgage and a usufructuary mortgage, or of a usufructuary mortgage and a mortgage by conditional sale, do not fall within any of the other classes enumerated. The definition of an anomalous mortgage, therefore, includes simple mortgages usufructuary and mortgages usufructuary by conditional sale. Where the mortgage is neither purely simple nor usufructuary exclusively, but mixture of the two, it would be an anomalous mortgage.⁸ Further, mortgage may be anomalous without being made up of two or more of the four kinds defined in the section.⁹ When it is a combination of two or more kinds of mortgages, it has been held that the rights and the liabilities of the parties would be governed by the contract between the parties as evidenced by the mortgage deed or by the local usage.¹⁰

USUFRUCTUARY MORTGAGE (UM):

SECTION 58(D) and SECTIONS 62, 67 & 109 of the Act

The definition of 'usufructuary mortgage' in Clause (d) gives the essential ingredients of a usufructuary mortgage. Delivery of possession is one of them. To constitute a transaction a usufructuary mortgage, all the essential ingredients must be found to co-exist. The mere fact that possession is given to the mortgagee over certain property does not necessarily show that the mortgage is a usufructuary mortgage, as defined in this section. Another essential ingredient of a usufructuary mortgage is that the mortgagor authorises the mortgagee to receive the rents and profits accruing from the mortgaged property, or any part of such rents and profits, and to appropriate the same—

- i. in lieu of interest, or
- ii. in payment of the mortgage-money, or
- iii. partly in lieu of interest and partly in payment of the mortgage money.

An essential condition of a usufructuary mortgage is that the mortgagee is authorised to retain possession of the mortgaged property until payment of the mortgage – money. No time limit is fixed for redemption¹¹. If no such authority is given, the transaction cannot be treated as a usufructuary mortgage. There is no personal liability on the part of the mortgagor to repay the mortgage money. It follows that, if the rents and profits are not to be appropriated in lieu of interest, or of principal, or of both, but are to be set off against the interest agreed upon and in case of deficit the mortgagor is to be personally liable, the mortgage is not a usufructuary one.

Since usufructuary mortgagee is a transferee of right of possession, and he retains possession until the mortgage money is paid off he cannot sue the mortgagor either for sale or for foreclosure. The mortgagee has no remedy except to enjoy the usufruct of the mortgaged property.

For the proper understanding of UM Section 62, Section 67 and Section 109 have to read along with Section 58(d). Section 58(d) talks about the essentials of UM and Section 62 and 67 provide for how UM can be brought to an end.

Plain reading of Section 67 with Section 58(d) makes it very clear that the only remedy that a usufructuary mortgagee of Type I¹² has for non-payment of UMM¹³ is the option to simply continue to retain possession until the UMM is paid back from the rents and profits of the land. He does not get the right to bring the property to sale.

Section 58(d) read with Section 109 derive us to the conclusion that a usufructuary mortgagee of Type II¹⁴ obtains all the rights of the transferor/ lessor, as against the lessee, which the lessor had against such lessee. These mainly are:

- i. Right to receive rents and profits from the lessee directly in his own right.
- ii. Right to enforce all the terms of the lease against the lessee.

⁸ Munni Lal v. Phuddi Singh, AIR 1987 All 155 vide Transfer of Property Act, 1882

⁹ Janaki Nath v Asad Reza, AIR 1936 Pat 211(220)

¹⁰ Ram Padarnath v Nimar Singh, AIR 1942 Oudh 172(174)

¹¹ Clause (b) of Section 62 provides that in the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the mortgaged property where the mortgagee is authorised to pay himself the mortgage-money from the rents and profits, when the term, if any, prescribed for the payment of the mortgage-money has expired and the mortgagor pays or tenders to the mortgagee the mortgage-money. It may, therefore, be said that it is not necessary in a usufructuary mortgage to fix any period of redemption and there may be a covenant that redemption is to take place whenever the mortgage-money is paid.

¹² Usufructuary mortgage of Type I refers to a situation when the mortgagee is actually put in possession

¹³ Acronym for usufructuary mortgage money

¹⁴ Usufructuary mortgage of Type II refers to a situation when the mortgagee is not put in possession but promised to be put in possession

- iii. Right to bring the lease to an end by forfeiture if the lessee stops paying rent and refuses to restart paying rent.
- iv. Right to get back the possession once the lease comes to an end.

Hence, for the duration of UM Type II it is the usufructuary mortgagee who is to be considered the lessor.

Plain reading of Section 62 provides for when can the right of redemption be exercised. It covers two situations namely:

- i. When rents and profits are to be appropriated towards satisfaction of whole of UMM
- ii. When rents and profits are to be applied to partial satisfaction interest or principal money or both

It does not visualise a third situation where NO money is to be appropriated from rents and profits for satisfaction of UMM. Had the legislators wanted to bring the third situation under usufructuary mortgage they would have included in under this Section.

Hence, all these provisions taken together, conclude that mortgagee being put or promised to be put in possession of the property there has to be a rule of appropriation where some part of the UMM is to be appropriated from the rents and profits of the mortgaged land. Else, transaction would not constitute a UM.

Explanation to Section 62:

Cases where rents and profits are to be appropriated in lieu of interest (1)—

In case where the mortgagor authorises the mortgagee to receive the rents and profits in lieu of interest, as where he covenants that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money, or partly in lieu of interest and partly in payment of the mortgage-money, and possession is given, the transaction is one of a usufructuary mortgage under which the mortgagee is entitled to receive the rents and profits in lieu of interest, or partly in lieu of interest and partly in lieu of principal, and, therefore, the mortgagor is entitled to redeem on payment merely of principal, without interest.¹⁵

Cases where rents and profits are to be appropriated in payment of the mortgage money (2)—

In case, where the mortgagor authorises the mortgagee to receive the rents and profits in lieu of principal, the mortgagor continues to pay interest and is entitled to redeem when the rents and profits received equal to the amount of the principal.

Cases where rents and profits are to be appropriated partly in lieu of interest and partly in payment of mortgage-money (3)—

In case, where the mortgagor authorises the mortgagee to receive the rents and profits partly in lieu of interest and partly in lieu of principal, the mortgagor is not entitled to redeem until the principal and interest are paid out of the rents and profits; in such a case, an account is necessary to ascertain whether the principal and interest have been paid off.

Where, however, the rents and profits are taken in lieu of interest and defined portions of the principal, the debt is discharged when the principal is paid and no account is necessary.

Cases falling under category (1) are not self-redeeming but those falling in categories (2) and (3) are self-redeeming.

ANALYSIS OF THE CASE LAWS

Narpatchand A. Bhandari v. Shantilal Moolshankar Jani; (1993) 3 SCC 351

While deciding the question as to whether the expression 'landlord' in Sub-section (1) of Section 13 of the Bombay Rents Hotel and Lodging House Rates Control Act, 1947 (the Act) cannot be said to include 'an usufructuary mortgagee' where the tenanted premises is the subject of usufructuary mortgage, the Hon'ble Supreme Court observed in para 5,

As could be seen from the definition of 'usufructuary mortgage' in Clause (d) of Section 58 of the Transfer of Property Act, 1882 - the T.P. Act, an usufructuary mortgagee is a transferee of a right to possession of the mortgaged property and the right to receive the rents and

¹⁵ Pertap Bahadur Singh v. Gajadhar Baksh, ILR 24 All 521: 29 IA 148. vide Transfer of Property Act, 1882 By Sanjiva Row commentary on www.manupatra.com

profits accruing from such property. When a lessor of a leased property creates an usufructuary mortgage in respect of such property what he transfers under Section 109 of the T.P. Act as a mortgagor in favour of the usufructuary mortgagee includes his right to possession of such property and the right to receive the rents and profits accruing from it. Thus Section 109 of the T.P. Act entitles the usufructuary mortgagee from the lessor, as against the lessee, for all rights which the lessor had against such lessee. From this, it follows that tenanted premises, if is mortgage by the landlord by way of usufructuary mortgage, the usufructuary mortgagee thereunder would become entitled to receive the rents and profits accruing from such property in his own right and on his own account.

In the present case in a storeyed building comprising of a large number of flats occupied by different tenants a flat was leased by the owner of the building in the year 1952 to a lessee. In the year 1958 the owner mortgaged with possession the said building in favour of another person, mortgagee. The lessee along with the other tenants in the building became the tenants of the mortgagee and continued as such tenants on payment of monthly rents to them.

But, by a quit notice dated July 3, 1967 the mortgagee determined the monthly tenancy of the lessee and sought to recover from him the possession of the premises by instituting a suit in the court on the ground that the lessee had been guilty of conduct which was a nuisance or annoyance to the adjoining or neighbouring occupiers. That was a ground which entitled the landlord under Clause (c) of Sub-section (1) of Section 13 of the Act, to recover possession of the premises from the tenant.

Answering the question the Court observed that,

Clause (3) of Section 5 of the Act which contains the definition of 'landlord', states that under the Act 'landlord' means any person who is for the time being receiving or entitled to receive rent in respect of any premises on his own account and includes any person not being a tenant who from time to time derives title under a landlord, unless there is anything repugnant to the subject or context. There, comes Section 13(1) of the Act entitling landlord to recover possession of any premises from his tenant on the ground envisaged under Clause (c) thereof, that is, the tenant or any person residing with the tenant being guilty of conduct which is a nuisance or annoyance to the adjoining or neighbouring occupiers, and that Section 13(1) contains nothing repugnant in its subject or context which would disentitle an usufructuary mortgagee, as a landlord of the tenanted premises to recover its possession from the tenant on the said ground.

Govindoo v. Ramchander, AIR 1957 AP 511

Two houses were mortgaged. One of the terms of the mortgage was that if the mortgagor failed to redeem the property within three years of the date of the mortgage, it shall be deemed to have been sold to the mortgagee. The mortgagor did not, however, redeem the mortgage and the mortgagee brought the present suit. Instead of making a prayer for foreclosure he prayed that a decree for sale of the mortgaged property be passed against the mortgagor.

The question before the court was whether the transaction in question was a mortgage by conditional sale or was it an anomalous mortgage?

At para 5 the court observed that,

....the mortgage-bond in question appeared to be a mortgage with possession with a default clause entailing the penalty in the form of an automatic sale. It did not fall within the definition of a mortgage by conditional sale for by the terms of the document it did not purport to be an ostensible sale but to be a mortgage only. It only said that, on default of payment, the land was to be regarded as sold.

It was held not to be a usufructuary mortgage either, though the possession appeared to have been given to the mortgagee. It was pointed out that,

....in order that a transaction may be regarded as a usufructuary mortgage, it is necessary that there must be stipulation that the mortgagee will appropriate the rents and profits in lieu of interest, or of the principal, or both. The bond in question was silent about interest. It contained a provision that the profits arising out of the mortgaged property would be appropriated towards the principal. His Lordship observed that, if the payment of interest

and its rate were agreed upon, then it may have been possible to hold that it was intended that they were to be appropriated towards interest.

It was held, that the disputed mortgage being neither usufructuary nor a mortgage by conditional sale was an anomalous mortgage.

Kamalamma v Ramabhadra Gupta; ILR 1988 KAR 20

Suit was filed for the recovery of mortgage money. A mortgage was executed by the mortgagor in favour of the mortgagee. On the same day a lease deed was executed by the mortgagor taking the mortgaged property on lease. In both the deeds the mortgagees were described as usufructuary mortgagees. The question for consideration by the Court was whether the transactions were usufructuary or anomalous mortgages.

On the question of interpretation of mortgage deed the court observed,

it is not a mere description of the mortgage that is determinative of the nature of the mortgage but the terms of the mortgage coupled with the contemporaneous document if any concerning the mortgage and the mortgaged property will be determinative of the nature of the mortgage.(Para - 5.3)

As per the terms contained in Ex. P-1 and P-3, the mortgagee has to remain in possession of the mortgaged property as security for repayment of the sums for which the two mortgages are executed. For the mortgage money, there is no interest stipulated. Clause 3 of the mortgage deed Ex. P-1 states that “the mortgagee shall be entitled to remain in possession of the said property and receive all rents and profits therein in lieu of the benefit for his investment of the said sum till the payment of the entire loan and the mortgagee shall not be liable to account for such rents and profits.” Clause 4 further provides that the taxes and cesses payable in respect of the mortgaged property are to be paid by the mortgagors and in the event they fail to pay the same, it is left to the option of the mortgagee to pay the same and add it to the principal with interest at 9% per annum. Clause 5 provides that the mortgagors will at their own cost effect all such repairs to the mortgaged property as maybe necessary from time to time and if they fail to do so, the mortgagee shall be entitled to effect such repairs and add such amount spent by him for such repairs with interest thereon at 9% per annum to the principal amount of the mortgage. Under Clause 6 the mortgagors have undertaken to repay the mortgage money together with all costs and charges. It also further provides that the mortgagors will not be entitled to redeem the mortgage until the expiration of 5 years from the date of the deed. Thus, the terms of the mortgages do not provide that the mortgagee has to account for the rents and profits received by him from the mortgaged property.

In the case of Usufructuary mortgage, the mortgagee is authorised to retain possession of the mortgaged property until payment of the mortgage money and to receive the rents and profits from the mortgaged property or any part thereof and is entitled to appropriate the same towards the principal and the interest due under the mortgage, thus in the case of usufructuary mortgage, the mortgagee has to account for the rents and profits received by him from the mortgaged property. It may so happen that in course of time the mortgage money may stand satisfied and sometimes it may be more than the mortgage money and in that event the mortgagee has to pay while returning the mortgaged property to the mortgagors, the excess amount of rent or profit received by him. (Para 5.4)

In the case of mortgage with a contemporaneous document of lease back, forming part of one and the same transaction of mortgage, where under the lease amount approximately tallies with the rate of interest fixed on the amount paid under the mortgage or if no rate of interest is stipulated in the mortgage deed which enables the mortgagee to remain in possession of the mortgaged property until the mortgage money is paid and there is no liability on the mortgagor to account for the rents or profits received from the mortgaged property, further with a clog on the right of redemption followed almost simultaneously by a deed of lease back executed by the mortgagor and the rent received thereunder is either equivalent to or more than the rate of interest prevailing at that time, such mortgage is anomalous mortgage as the lease back is a part and parcel of the same transaction of mortgage, and it is only a device to ensure payment of interest.

The test is whether under the terms of the mortgage there is a liability on the mortgagee to account for the rents and profits received by him from the mortgaged property and whether leasing the mortgaged property back to the mortgagor is an independent transaction not forming part of the mortgage transaction. (Para 5.4)

Having regard to the terms contained in the two mortgage deeds to which a detailed reference has already been made, and the two registered documents of lease, leasing the mortgaged property back to the mortgagors which have come into existence almost simultaneously immediately after the execution of the mortgage deeds attested by the very same witnesses who attested the mortgage deeds, the rent stipulated in them which is nothing but interest on mortgage money advanced under the two mortgage deeds in question and having regard to the fact that the lease period also coincides with the period stipulated in the mortgage deeds during which the mortgagors are not entitled to redeem, as such they are not different transactions and they form part of the mortgages in question, and there is no liability on the mortgagee to account for the rents and profits received by him from the mortgaged property, we are of the view that the mortgages question are anomalous mortgages.

Mattapalli Venkataratnam and Ors.v Tota Varahaliah and Anr., AIR1932Mad768

The mortgagees filed a suit to recover possession together with arrears of rent and mesne profits from the lessees. It was contended by the mortgagees that since they were the usufructuary mortgagees they were entitled to collect the rent due by the lessees and to eject them from the suit lands on completion of the period of lease. It was contended by the lessees that the mortgage was a simple mortgage and therefore the mortgagees were not entitled to ask for possession of the suit lands, ejecting the lessees, therefrom.

It was observed by the learned Judge that unless the mortgage in favour of the mortgagees can be deemed to be an usufructuary mortgage, their present suit in ejectment must fail. There is also a third alternative. If the deeds evidence a combination of simple and usufructuary mortgages, the mortgage would be an anomalous mortgage, in which case the intention of the parties should be gathered from the terms of the instrument as controlled by the provisions of the Act. The rights and liabilities of the parties have to be determined by their contract. (para 5)

Though the mortgage deed was styled as mortgage with possession there was an express covenant to pay the entire balance of principal and interest in 3 years, coupled with a further provision, that in case of default in such payment, the mortgagees may recover the money due, by means of the mortgaged property and also from the mortgagors personally. These were the ingredients of simple mortgage. The question was whether it also amounted to usufructuary mortgage. The definition in Section 58(d) of TPA would apply as it stood before amendment of 1929. The court observed at para 6 that,

The transaction would be an usufructuary mortgage, where the mortgagor delivers 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, in lieu of interest, or in payment of the mortgage money. The delivery of possession of the mortgaged property is thus an essential ingredient of an usufructuary mortgage. It has to be seen whether the delivery of constructive possession of the mortgaged property, which the owner has at the time of the mortgage, as it is in the physical occupation of a tenant by reason of a lease having been previously granted to him for a term, would suffice to bring the transaction within the aforesaid definition.

The Judges relied on a case law of 1886 (Palani v Selambara, ILR (1886) 9 M 267) where it was held that it is not confined to delivery of actual or physical possession, but delivery of constructive possession, by directing the tenants in occupation to pay their rents to the vendee, and by the tenants agreeing to do so, and observed

The principle of the decision seems to be, that the transfer of such possession as the vendor had at the time of sale, according to the circumstances of the interest he had in the property, would be delivery of possession within the meaning of that section. (Para 6)

The court found that the mortgagor had under the deed transferred to the mortgagees the right to collect the rents due in respect of the suit lands from the tenants in occupation thereof, authorising them to receive the rents and appropriate the same towards interest and principal. It was admitted by the lessees that they had been paying the rents to the mortgagees for few years.

Accordingly the court concluded that there was delivery of constructive possession of the mortgaged lands, which is as efficacious as delivery of actual physical possession, and the mortgagee was authorized, under the deed, take possession from the tenants and appropriate the rents and profits towards the mortgage debt. (Mortgagees would, of course, not be entitled to eject the lessees, unless the mortgagor has such a right.)

Here, it is worth noting the observations of another judge on bench, Justice Curgenvin, *The definition of an usufructuary mortgage already referred to expressly contemplates the mortgagee receiving "the rents and profits accruing from the property", and there can be no ground for holding that a rent is not a form of usufruct equally with other receipts more directly derived from the land. In a case where property is under lease the mortgagor gives his mortgagee such possession as it is capable of, and the mortgagee, who takes possession by assuming the right to receive rents from the tenants, gains his usufruct in such form as the property is capable of yielding. These propositions appear to me elementary and in no need of support from authority.*

Mahendru Nath v. Kalipada, AIR 1940 Cal 486

The mere fact, that, in a particular mortgage, the possession of the property is delivered over to the mortgagee with a stipulation that he would enjoy the usufruct of the property and credit the same towards the interest in the mortgage-bond, while the mortgagor had promised to pay the entire mortgage debt within a fixed period on payment of which the mortgaged property was to be released to him, and, in case of default, the mortgagee was entitled to foreclose the mortgage, and the conditional sale was thereupon to ripen into an absolute sale, did not make the document, which was a mortgage by conditional sale, a usufructuary mortgage, since an essential element of a usufructuary mortgage that the mortgagee could retain possession of the property till the mortgage-money was paid was wanting.

Jagat v. Hari Chand, AIR 1959 J & K 103

The mortgage deed expressly recited that the mortgagee was to have possession of the mortgaged property, that actual possession had been handed over to him, that the mortgagee was entitled to live in the house himself or to lease it out to somebody else, and that the rent so collected was to be considered equal to the interest on the mortgage-money. On the day the mortgage was registered, the mortgagee granted a lease back to the mortgagor by a separate deed reserving a monthly rent and providing that in default of payment of rent by the mortgagor he would become liable to be evicted. In a suit by mortgagee for eviction the mortgagor contended that the mortgage and the lease-back created a simple mortgage under which the mortgagee had no right to possession of the mortgaged property. It was held, that the transaction was a usufructuary mortgage and that the relationship between the parties was that of lessor and lessee and the mortgagee was, therefore, entitled to evict the mortgagor.

Pallathumpadikkal Rayankutty v. Saidalavi and Ors., AIR 2001 Ker 218

Here, a suit was filed for redemption of mortgaged property. It was contended by the mortgagees that the property could not be redeemed as it was loan and not mortgage. The Court found that the possession of property was delivered to the mortgagee and was asked to take yields from the property and adjust the same towards interest and also was directed to surrender the possession on the receipt of mortgage money and value of improvements. And as the transfer was not intended by the parties for the enjoyment of the property by the transferees but solely to secure the amount advanced by him, the transaction was held to be UM and not lease. (para 12 and 13)

Rysani Madliava Chettiar Charity Fund v. G.R. Krishnasamrny AIR1923Mad71,

Under a mortgage, possession of the mortgaged property was given to the mortgagee but rents and profits were not given in lieu of interest. There was a separate provision fixing the rate of interest and the method by which it was recovered, namely, that the rents and profits

were to be set off, as far as available, towards the payment of interest. The contingency of an excess of rents and profits over interest or vice versa was specifically contemplated, and for the case of deficit, where the whole of the interest was not met from rents and profits, it was provided that the mortgagee may recover from the mortgagors month after month. The sum to be repaid prior to redemption and for the purpose of redemption was merely the original principal sum. It was held, "that the document meant that interest was not to be charged on the mortgaged property but was left to be recovered under the personal covenant of the mortgagors."

Observations of Justice Wallace

It is not a simple mortgage because possession of the mortgaged property is given; hence the usual principle that in a simple mortgage interest as well as principal is secured on the property will not prima facie apply. It is not a usufructuary mortgage because the rents and profits are not given in lieu of interest; but there is a separate provision fixing the rate of interest and the method by which it is to be recovered, namely, that the rents and profits are to be set off, as far as available, towards the payment of interest. The contingency of an excess of rents and profits over interest or vice versa is specifically contemplated and for the case of deficit, where the whole of the interest is not met from rents and profits, it is provided that the mortgagee may recover "from us" (that is the mortgagors) "month after month." This, to my mind, means that the remedy which the parties secured by the mortgage for any interest not discharged by the rents and profits was a personal remedy, and that such deficiency was not to be added to the principal mortgage sum. This view is strengthened by a further sentence in the mortgage-deed: "we shall pay the aforesaid principal of Rs. 10,000 to you or your order, redeem this mortgaged property and take back the document," which seems to me to indicate further that the sum to be re-paid, prior to the redemption, and for the purpose of redemption was merely the original principal, sum, I therefore hold that this document means that interest was not to be a charge on the mortgaged property, but was left to be recovered under the personal covenant of the mortgagors.

Ram Dayal v. Bhanwarlal, AIR 1973 Raj 173 (183, 184)

In the suit for enforcement of the mortgage the mortgage deed read as follows:

"The mortgage deed contains a clear recital that an amount of Rs. 23,000/- will carry interest at Re. 0-7-0% per month and that the monthly interest will amount to Rs. 109-6-0. It was further provided that the rent of the mortgaged properties would be appropriated towards interest and if they exceed the amount of interest, the balance would be appropriated towards the principal. It was further agreed that in case the rents and profits were less than the mortgagors would be liable to pay the balance every year, and would be liable for compound interest if the amount is not deposited in time. There was also a stipulation that the properties shall remain mortgaged until the principal amount together with interest is repaid."

The mortgagees wanted a decree for the sale of the mortgaged properties for the recovery of sum advanced. The mortgagors contend that the mortgage deed results in the creation of a pure usufructuary mortgage and, therefore, the mortgagee cannot bring a suit for sale of the mortgaged properties.

The court observed,

From the above analysis of the document, it is clear that both the principal and the interest were secured by the mortgage of the properties and that the mortgagors took personal liability for the payment of the interest which is a part of the mortgage money and which was also secured by the mortgage of the properties. We have no doubt that having regard to the nature of the document cannot be considered as a pure usufructuary deed. In our opinion, the mortgage is an anomalous one.

Establishing the Preposition

Mortgage by conditional sale can also be usufructuary mortgage if ingredients of latter are also satisfied. If a mortgage is by way of conditional sale it does not necessarily mean that it is not a usufructuary mortgage. If the ingredients of usufructuary mortgage are also satisfied by delivery of possession it may also amount to usufructuary mortgage. The two mortgages are not necessarily mutually exclusive and one mortgage can be of both types.

Section 58(d) of the Act enlists the ingredients of an usufructuary mortgage. The distinguishing feature of this mortgage is that in lieu of payment of interest or adjustment of the whole or part of the borrowed amount, the mortgagor permits the mortgagee to enjoy the rents of a specified immovable property and delivers the possession thereof, to the mortgagee. This would serve two purposes viz., providing security for repayment of the borrowed amount and adjustment of rent accrued thereon, towards of the interest or principal, or both, as the case may be.

In usufructuary mortgage as the mortgagor does not bind himself to repay (though may repay the mortgage-money 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.

It is an essential incident of a usufructuary mortgage that personal liability on the part of the mortgagor is excluded. A usufructuary mortgagee is not entitled to sue for sale of the property, and when there is a stipulation to the contrary, the transaction ceased to be one of usufructuary mortgage and is described as an anomalous mortgage. A personal covenant to pay implies a right of sale, and an express covenant to pay excludes the mortgage being taken as a purely usufructuary mortgage.

So, where in an usufructuary mortgage, a personal remedy is given to the mortgagee, whether or not it is accompanied by a right of sale, the mortgage ceases to be a usufructuary one and becomes an anomalous mortgage, in which the rights of the parties are governed by the contract between the parties.

Having regard to the nature of the deed, as where it is a usufructuary mortgage only and to its terms, any personal liability on the part of the mortgagor must be excluded. In case it is not, the mortgage is an anomalous one.

A mortgage by conditional sale is non-possessory mortgage because no delivery of possession is given under it. Therefore, the mortgagee does not have the advantage of repaying himself. He can only claim the property on as absolute owner in case of default of repayment on due date and this right can be enforced only by a suit for foreclosure. The mortgagee does not acquire any personal right against the mortgagor nor does he become entitled to possession of the property.

Under an English mortgage the debtor is personally liable to pay the debt; a covenant to repay the mortgage-money being a sine qua non of an English mortgage. The mortgagee acquires a right to take the possession as soon as the mortgage is executed. For all practical purposes, he is the owner and the mortgagor has a right in equity to redeem his property if he is able to repay the amount on a certain date.

Of the five types of mortgages provided by the Act, the mortgagee is put in possession in three of them, UM, EM and AM. If mortgagee is put into possession of the land and there is a rule of appropriation where no part of the UMM is to be appropriated from the rents and profits of the mortgaged land, then it will be EM, or some form of an AM but not UM.