

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Brandt.

1887.
July 25.

VENKATASÁMI AND ANOTHER (DEFENDANTS NOS. 2 & 3), APPELLANTS,
and

SUBRAMANYA (PLAINTIFF), RESPONDENT.*

Transfer of Property Act—Act IV of 1882, ss. 1, 67, 86—89—Usufructuary mortgage, dated 20th April 1882, sued on in 1884—Form of decree.

In a suit filed in 1884 on a usufructuary mortgage, dated 20th April 1882, a decree was passed for the payment of the mortgage money, or in default for the sale of the mortgage property :

Held, (semble under the Transfer of Property Act) that the decree for sale was the right decree.

APPEAL against the decree of Mr. Justice Handley, a Judge of this High Court, in Civil Suit No. 293 of 1884.

This was a suit on a usufructuary mortgage, dated the 20th April 1882. The mortgage deed was admitted by the contending defendants who, however, argued, *inter alia*, that the plaintiff could not “obtain a decree for foreclosure or sale,” as to which Handley, J., observed, “even if that would be so under the Transfer of Property Act, which I doubt, the Act does not apply to this case for the mortgage sued on is dated before it came into force.” The learned Judge held that the plaintiff’s case was established, and passed a decree for the sum claimed, and in default of payment in six months, for the sale of the mortgage property as prayed in the plaint.

The defendants preferred this appeal on the ground (among others) that the Transfer of Property Act was applicable and in any case the plaintiff as usufructuary mortgage was not entitled to sue for foreclosure or sale.

Mr. Subramanyam and Appadorai Mudaliar for appellants.

Anandachárlu and Visvanadha Ayyar for respondent.

The arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgment of the Court (Muttusámi Ayyar and Brandt, JJ.). Their Lordships after

* Appeal No. 22 of 1886.

discussing the evidence and expressing an opinion upon it in accordance with that of Handley, J., proceed as follows:—

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JUDGMENT.—Then comes the question whether the decree under appeal is open to objection in so far as it orders a sale of the property under mortgage in default of payment in six months.

It is urged that such direction is bad in law under clause (a) of s. 67 of the Transfer of Property Act—Act IV of 1882—which provides that nothing therein contained “shall be deemed to authorize a simple mortgagee as such to institute a suit for foreclosure, or an usufructuary mortgagee as such to institute a suit for foreclosure or sale, or a mortgagee by conditional sale as such to institute a suit for sale.”

What is the precise effect of the limitations contained in the foregoing clause?

The suggestion that no decree either for foreclosure or sale can be lawfully made in a suit based on a usufructuary mortgage is on the face of it absurd. The intention is to indicate the specific remedy which, in the absence of an express contract, is available in regard to each of the transactions defined by s. 58, viz., simple mortgage, mortgage by way of conditional sale, usufructuary mortgage, and English mortgage.

Section 67 provides, first, that a simple mortgagee is not at liberty to sue for foreclosure, and implies thereby that he can only ask for sale, for the contract as defined in s. 58, clause (b), provides only for sale, and discloses no intention that the property should in any event vest absolutely in the mortgagee or that the mortgagor should be divested of the estate otherwise than under a sale. Similarly, a mortgagee by conditional sale is not entitled, in the absence of an express contract, to institute a suit for sale, for the contract provides for the mortgage ripening into a sale in default of payment, and implies an intention on the part of the mortgagee to take the mortgaged property in satisfaction of the debt when that event has happened. His remedy is accordingly confined to a suit for foreclosure. Section 88, paragraph 2, excepts a mortgage by way of conditional sale from the class of cases in which the Court *may* pass a decree for sale in a suit for foreclosure. An usufructuary mortgagee as defined by s. 58, clause (d), may retain possession of the mortgaged property until his debt is repaid, and may appropriate the rents and profits accruing from the property, either in lieu of interest or in payment of the

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 " principal.
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Whether the mortgagee is at liberty to claim foreclosure as of right will depend upon the terms of the particular contract, but the contract as defined by the Act does not imply an intention that the mortgagee may at his option insist upon either remedy as in the case of an English mortgage. Section 67, clause (a), provides that the usufructuary mortgagee is not entitled as such, in the absence of an express contract to the contrary, to institute a suit for foreclosure or sale. It implies that he can sue only for the one or for the other, and not for the one or the other in the alternative. That this is the true construction is clear from ss. 86—89, the language of which and, in particular, the words in s. 86, "shall transfer the property to the defendant: and shall, if necessary, put the defendant into possession of the property," include usufructuary mortgages among transactions upon which the mortgagee may institute a suit for foreclosure or a suit for sale.

It is important to bear in mind the distinction that exists between the power of the Court to decree a sale in a suit for foreclosure, and the right of the usufructuary mortgagee as founded on the contract. The second paragraph of s. 88 deals with such power and is taken from 44 and 45 Viet. c. 41, s. 25. It was a power constantly exercised by Courts of Equity in England, and it may be that it is inserted in this Act with reference to a notion which was commonly held in this country, that a mortgage was intended to be only a security and to be always releasable. In exercising this power the Court is authorized to impose such terms as it thinks fit to prevent injustice or unfairness to the mortgagee.

The usufructuary mortgage, which is the subject of the present suit, was not in the nature of a mortgage by way of conditional sale. The decree for sale was the only one which the plaintiff was entitled to claim and the Court was at liberty to make. We must overrule the objection taken in appeal to the form in which the decree has been made, and dismiss the appeal with costs.
