reasonable to permit a person whose claim had been adjudicated on in the manner pointed out by the Act to have that claim reopened and again heard in another suit. That principle applies to this case.

The second and third grounds of appeal fail for the reason given respecting their subject matter by the District Judge.

The fifth ground of appeal also fails as there has been no misconstruction by the District Judge.

We do not see that the ss. 5, 10, 16, 17 or 40 of the Forest Act were any of them misconstrued.

The District Judge did not decide that the adjudication made by the Forest Settlement officer was made in a "Forest Court" under s. 37 to s. 41; nor did the Forest officer purport to adjudicate in "Forest Court" within the meaning of the Forest Act.

We therefore dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Kernan and Mr. Justice Muttusámi Ayyar.

CHATHU (PLAINTIFF), APPELLANT,

and

KUNJAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

1888. August 29. November 16.

Transfer of Property Act, s. 67 (a)—Usufructuary mortgage—Remedy of mortgagee.

A usufructuary mortgagee is not entitled, in the absence of a contract to that effect, to sue for sale of the mortgage property.

SEMBLE:—The construction placed on s. 67 (*a*) of the Transfer of Property Act, 1882, in *Venkatasami* v. *Subramanya* (I.L.R., 11 Mad., 88) that a usufructuary mortgagee can sue either for foreclosure or for sale but not for one or other in the alternative is wrong.

APPEAL from the decree of V. P. deRozario, Subordinate Judge at Palghat, modifying the decree of B. Kamaran Nayar, District Munsif of Betutnad, in suit 415 of 1884.

The facts necessary for the purpose of this report appear from the judgments of the Court (Kernan and Muttusami Ayyar, J.J.).

Sankaran Nayar for appellant.

Sankara Menon for respondents.

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* Second Appeal No. 1362 of 1887.

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KERNAN, J. (after disposing of the other grounds of appeal proceeded as follows) :— .

The fifth ground of appeal is that the plaintiff is entitled as usufructuary mortgagee to have a decree for sale of the land. Whether the plaintiff is so entitled depends on the provision of the usufructuary mortgage. That mortgage in terms mortgaged to the plaintiff's anandravan Achuta Menon five items of property (the subject of the plaint) which yield 125 paras of paddy for Rupees 400 and 200 paras of paddy valued at Rupees 100. It was thereby provided, "you shall hold the lands in your possession and take from the rent of 125 paras of paddy 93 paras of paddy, made up of 86 paras for interest at 5 paras of paddy per 100 fanams and at 8 paras of paddy per 100 fanams and of 7 paras of paddy on account of allowance for drying, and pay the balance 32 paras of paddy for revenue and michavaram." It was further provided that when the above-mentioned mortgage amount is paid by two instalments and the paddy by one instalment, the same shall be credited in the document, and the lands shall be surrendered. That usufructuary mortgage does not fix any time for payment. It is open to the mortgagor to pay off the mortgage or not as he pleases. The plaintiff cannot compel payment of the mortgage amount, as there is no covenant or agreement express or implied for payment by the mortgagor. The contract of the parties is defined by the instrument. The mortgagee has a right to the produce of the land and to pay himself thereout interest, and apply the balance for allowance for drying and for revenue and michavaram. I am not aware that it ever has been held that a mortgagee under such an instrument could sue for payment of the amount of the principal of the mortgage either by personal action against the mortgagor or by sale of the land. Section 68 of the Transfer of Property Act probably would apply if the facts thereby contemplated occurred in this case, but they do not. There may be various provisions in mortgages partly usufructuary and called usufructuary mortgages though they are not such; and if, according to the terms of such instrument, the mortgagee is permitted to sue for payment or for sale, such terms will form the contract in such cases. The definition given in s. 58, cl. (*d*) is a true definition of a usufructuary mortgage, and it does not fix a time or contain any covenant or agreement

for payment. *Venkatasami* v. *Subramanya*(1) was cited where it was held that the usufructuary mortgagee was held entitled to a sale.

The provisions of that usufructuary mortgage are not given in the report of the case, and they may not have been the same as in this case. Therefore it is not to be considered as an authority to be followed in this case. If the terms of the mortgage appeared to be in that case similar to those of this case, I would be bound to refer this case to a Full Bench for decision, as I am not able to agree in the construction put in that case on various sections of the Transfer of Property Act, under which construction a mortgagee by usufructuary mortgage would be entitled to a decree for payment or for sale or foreclosure. In the circumstances contemplated by s. 68 of that Act, a decree for payment may be made, and plaintiff contends in his sixth ground of appeal, that as the property was sold in suit No. 518 of 1879, his rights were prejudiced. But such sale was not made or caused by any act of the mortgagor and therefore is not within s. 68. The sale made is the only act alleged to prejudice the plaintiff, and therefore s. 68 does not apply. It is not necessary to decide whether s. 68 applies to a usufructuary mortgage made, as that in this case was, before the Transfer of Property Act came into operation.

The objection that the plaintiff should, on his seventh ground of appeal, be declared usufructuary mortgagee is good and the decree should be modified to this extent.

We therefore modify the decree of the Lower Appellate Court by declaring that the plaintiff is entitled to a usufructuary mortgage on the properties and kanam mortgaged to him, and subject to the above modifications the decree of the Lower Appellate Court is confirmed. Plaintiff failed and the appeal is dismissed with costs.

MUTTUSAMI AYYAR, J.—I took part in *Venkatasami* v. *Subramanya*, and I am convinced on further consideration that the construction placed therein on s. 67 (*a*), so far as it relates to an usufructuary mortgage, is not correct. As stated in that case, the clause does not imply that an usufructuary mortgagee may sue either for sale or for foreclosure; on the other hand the proper interpretation is that he cannot sue for either remedy, whilst the

(1) I.L.R., 11 Mad., 88.

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mortgagor may either redeem or allow his right of redemption to become barred by limitation. In the last-mentioned case, the mortgagee would acquire ownership by prescription, and the limited interest originally created in the mortgaged property by way of security would then ripen into full ownership by the operation of the present Act of Limitation.

The fact was overlooked that s. 58 of Act IV of 1882 defined the three pure forms of mortgage into which mortgages in use in this country might be resolved, and that the definition of a pure usufructuary mortgage contained in clause (*d*) is framed with reference to what is known as the *vivum vadium* or the Welsh mortgage in English Law or the Bhoga Bandukom of Hindu Law, for an indefinite period in which there is no contract express or implied on the part of the mortgagor to repay the debt though he is at liberty to redeem the mortgage. The other sections of Act IV of 1882 to which reference is made in *Venkatasami* v. *Subramanya* are not inconsistent with this view.

Though s. 58 defines the three simple and pure forms of mortgage, yet the particular transaction which may happen to be the subject of litigation may be a combination of two or more of the simple forms, *e.g.*, a mortgage with possession containing a covenant for payment or conferring a power of sale on default of payment. The words in s. 67 "in the absence of a contract to the contrary" are intended to provide for such mixed forms. The decision in that case may be correct in the view that the transaction then before the Court was not a usufructuary mortgage pure and simple, but one in which there was an obligation to repay the mortgage debt. With these remarks, I concur in the judgment proposed by Mr. Justice Kernan.