

operation of the section. This distinction is not recognized explicitly in the majority of the cases relied on before us, perhaps because, as already observed, the place where loss was primarily sustained was uncertain. But it is referred to in *Langridge v. Atkins*(1) as the foundation of the decision in *Ganeshi Lal v. Nand Kishore*(2) on which the accused relies; and it was not drawn in the former case, because the averments in the complaint did not support it. Its validity was moreover endorsed directly in *Sirdar Meru v. Jethabhai*(3) where the act in question was a complete causing of grievous hurt and it was held that complainant's consequent incapacity for the statutory period in another jurisdiction would not affect the venue. We follow these authorities and hold that the complainant's firm's secondary loss at Madras will not give the Third Presidency Magistrate jurisdiction. He must return the complaint for presentation to competent Magistrate having jurisdiction over Nandyal.

KRISHNAMACHARI
D.
MESSRS.
SHAW,
WALLACE
& CO.
—
OLDFIELD J.

NAPIER, J.—I concur.

NAPIER, J

N.B.

APPELLATE CIVIL.

*Before Mr. Justice Coutts Trotter and Mr. Justice
Kumaraswami Sastriyar.*

AYYAKUTTI MARKONDAN (PLAINTIFF), APPELLANTS,

v.

PERIYASAMI KAVUNDAN AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

1915.
April 14.

Transfer of Property Act (IV of 1908), sec. 83—Usufructuary mortgage—Hypothecation—Deposit of usufructuary mortgage amount only—Refusal by mortgagee—Subsequent deposit of hypothecation amount—Compound interest at enhanced rate—Penalty—Deposit of compound interest at the original rate only, sufficiency of—Acceptance by Court, as reasonable compensation, effect of—Mesne profits, claim for, by plaintiff from date of deposit, if sustainable.

The plaintiff, as the vendee of certain lands which were subject to a usufructuary mortgage as well as a hypothecation in favour of the defendant, sought

(1) (1913) I.L.R., 35 All., 29. (2) (1912) I.L.R., 34 All., 487.

(3) (1908) 8 Bom L.R., 513.

* Second Appeal No. 1234 of 1912.

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to recover the property on payment into Court of the amount due under the usufructuary mortgage under section 83 of the Transfer of Property Act. The defendant claimed that the plaintiff should deposit the sum due under the hypothecation bond also. The plaintiff paid subsequently into Court an amount as due for principal and interest on the latter bond, but calculated compound interest at the original rate and not at the enhanced rate after default as mentioned in the bond, disputing the provision as penal. The Court held the provision to be penal and accepted the amount paid for interest as reasonable compensation. The plaintiff claimed mesne profits from the date of his first deposit, but the defendant disputed his right to any mesne profits as the plaintiff did not deposit the full amount specified in the bond;

Held, (1) that the plaintiff was bound to deposit the amounts due under both the bonds and (2) that the plaintiff was not bound to deposit the penal rate of interest but that the payment of an amount as reasonable compensation which was accepted by the Court as proper, was legally sufficient to entitle the plaintiff to mesne profits from the date of the second deposit.

SECOND APPEAL against the decree of J. G. BURN, the acting District Judge of Madura, in Appeal No. 376 of 1910, preferred against the decree of F. J. DE'ROZARIO, the District Munsif of Dindigul, in Original Suit No. 104 of 1909.

The facts of the case appear from the judgment of COURTS TROTTER, J.

T. R. Venkatarama Sastryar for the appellant.

T. V. Muthukrishna Ayyar for the respondent.

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 TROTTER, J.

COURTS TROTTER, J.—In this case the plaintiff had created two incumbrances on his land—one a usufructuary mortgage and the other a hypothecation. The plaintiff being desirous of paying off his mortgage and recovering his property availed himself of the procedure under section 83 of the Transfer of Property Act, and paid the amount due under the mortgage namely Rs. 800 into Court on the 8th October 1908. The first defendant declined to receive that amount and claimed that the plaintiff was bound to deposit also the amount due under the hypothecation bond. Accordingly the plaintiff deposited the sum of Rs. 676-7-6 in respect of the hypothecation bond and tendered the two sums to the first defendant. A notice was sent to the first defendant who put in no appearance in Court and did not receive the money. The question which arises is this: the hypothecation bond was in respect of principal sum of Rs. 300 with interest at Rs. 1-6-0 per cent a month and also provided that if it was not paid off within the prescribed period, a year, then simple and compound interest at Rs. 2 per cent should run from the date of default.

Now the plaintiff when he paid the money into Court under section 83 of the Transfer of Property Act did not pay at the penal rate of interest, but he paid only compound interest at the rate of Rs. 1-6-0 as from the date of default and when the Court came to determine what was due the Court held that the amount was enough and that he had duly discharged the claim of the first defendant.

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—
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It has been contended before us that notwithstanding the fact that the amount paid in was the amount that was found due the payment and tender were bad on the ground that it was not for debtor to speculate as to what reduction the creditor would accept or the Court would make from the full letter of the bond, but that he must pay what is expressed to be due on the face of the instrument and get back any portion if he can. It is not apparent and the respondent has not been able to suggest that there is any legal means by which he would be able to get it back. In support of the proposition some English cases about tender were cited and among them was *Searles v. Sadgrave*(1). There in respect of an entire debt of £82 a tender was made of £55-6-0 which was arrived at by deducting a sum of money due in respect of a cross claim between the parties. The Court held that the tender to be good must be of the whole debt in respect of which it was tendered and that the debtor was not entitled to deduct the set off from the amount of the debt. Reliance was further placed upon *Venkatarama Aiyar v. Rangasami Aiyangar*(2). There it was held that where a tender was made of four-fifths of the mortgage amount where a partition was sought the tender was bad because the parties were not agreed as to what the proper proportions of division would be if a partition were made. These cases seem to be quite different in principle to the present and not in any way to cover it. The words of section 83 of the Transfer of Property Act are quite clear and they enact that "the mortgagor or any other person entitled to institute such suit may deposit in any Court in which he might have instituted such suit to the account of the mortgagee the amount remaining due on the mortgage." Here the amount legally due was what the Court found it to be and that was the amount which the plaintiff paid into Court. No question arises of any attempt to set off or

(1) (1855) 5 El. & Bl., 639.

(2) (1912) 23 M.L.J., 588.

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retain any balance. That which the plaintiff tendered was the debt and the whole debt as it was ultimately found to be and the fact that the instrument sought to provide for, and the defendant sought to exact in accordance with it a larger sum does not in my opinion affect the result that what the plaintiff tendered was the whole amount which was due and owing by him. I am therefore of opinion that the interest ceased to run at any rate as from the date when both the bonds were redeemed and paid off, namely, the 29th January 1909, and that as from that date the plaintiff should have mesne profits in respect of the property. He sought to go further and claimed mesne profits as from the 9th October 1908, the date when he paid off the original mortgage for Rs. 800. What he argued was that as he discharged the usufructuary mortgage-debt his right to mesne profits would accrue from that date as the hypothecation bond would not entitle the mortgagee to possession. This seems really an ingenious attempt to get round the decision of the Full Bench given the other day (1st April 1915) in *Subramania v. Balasubramanya*(1) which decides that a mortgagee is not bound to be redeemed piecemeal. We are bound by that decision and its principle is fatal to the appellants' contention.

Therefore the appeal is allowed and mesne profits will be decreed to the appellant as from the 29th January 1909 until delivery of possession. The amount of mesne profits will be determined by the Court of first instance. Each party will give and take proportionate costs.

KUMARA-
SWAMI
SASTRIYAR, J.

KUMARASWAMI SASTRIYAR, J.—I agree.

K.R.

(1) (1915) 1.L.R., 38 Mad., 927.