

APPELLATE CIVIL—FULL BENCH

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,
Mr. Justice Krishnan and Mr. Justice Beasley.*

RAMABHADRA THEVAR AND TWO OTHERS (DEFENDANTS
1 TO 3), APPELLANTS,

1926,
January 15.

v.

ARUNACHALAM PILLAI AND ANOTHER (PLAINTIFFS 1 AND 2),
RESPONDENTS.*

Transfer of Property Act (IV of 1882), ss. 83 and 84—Deposit by mortgagor—Refusal of mortgagee to take the deposit—Withdrawal of deposit by the mortgagor—Uncontroverted plea of continued readiness to pay—Effect of, on subsequent interest—Onus.

A deposit under sections 83 and 84 of the Transfer of Property Act is only a special kind of tender. If after a reasonable time after a proper deposit, the mortgagee, who has notice of such deposit, refuses to take the deposit, and the mortgagor thereafter withdraws the deposit, there is still a *presumption* that the mortgagor continued ready and willing to pay, which casts the onus on the mortgagee to prove the contrary.

Held, in a suit by the mortgagee for the mortgage money after such withdrawal, that an uncontroverted plea by the mortgagor that he continued ready and willing to pay, disentitled the mortgagee to claim any interest subsequent to the deposit.

APPEAL against the decree of ANANTANARYAANA AYYANGAR, Subordinate Judge of Tanjore, in O. S. No. 183 of 1922.

The facts are given in the Referring Order of ODGERS, J.

This Appeal and the Memorandum of Cross-Objections filed by the respondents coming on for hearing, the Court (PHILLIPS and ODGERS, JJ.) made the following

* Appeal No. 226 of 1924.

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ORDER OF REFERENCE TO A FULL BENCH:—

PHILLIPS, J.—The first point for consideration is the construction of the mortgage deed executed by the father of defendants Nos. 1 to 3 in favour of the first plaintiff's manager, fourth defendant. The first plaintiff on his own behalf and on behalf of his minor son, second plaintiff, sold certain property to the father of first defendant under Exhibit I on 11th September 1909. There was a prior mortgage on this property, dated 9th February 1908. As there was this prior mortgage and also because one of the vendors was a minor, the first defendant's father did not pay the whole of the purchase money, but retained a sum of Rs. 4,625. On the 15th September 1909 the first defendant's father hypothecated the property he bought, for this amount and stipulated that the first plaintiff should execute a security bond for Rs. 6,000 on or before the 14th September 1910. The relevant provisions in this mortgage deed which we have to construe are as follows:—

“ I shall pay the aforesaid amount of principal together with the interest . . . as soon as you execute and get registered before the 14th September 1910 a security bond in respect of immovable properties estimated by the mediators at rupees six thousand . . . If security is not given before the said stipulated date, I shall, up to the date on which the security is given, add interest on principal and interest on interest at the said rate with twelve months' rests and pay you the amount of principal and interest accruing due . . . ”

The lower Court has held, and I think rightly held, that the execution of this security bond was a condition precedent to the demand for the mortgage money and that therefore this suit for the money is not maintainable because the security bond had not been executed, but as the parties came to an agreement during the suit that the mortgage should be adjusted by means of this suit and that the suit should not be dismissed, the lower Court proceeded with the trial and held that there was no obligation on the first plaintiff to execute a security bond on any particular date and that therefore the mortgagor must pay compound interest on the amount of the mortgage from September 1910, because the deposit made in Court was not a valid deposit, being conditional. This conclusion is somewhat inconsistent with the finding that the execution of the security bond was a condition

precedent to the enforcement of the mortgagee's right, and it is now contended for the appellant that the first plaintiff was bound to execute the security bond after the date fixed therefor, namely, 14th September 1910, and that therefore when the mortgagor deposited the mortgage amount coupled with a request for the execution of the security bond it was a valid tender under section 83 of the Transfer of Property Act, although it was coupled with this condition. The question therefore for determination is whether the mortgagee was under an obligation to execute the security bond, an obligation which can be enforced by the first defendant. To adopt the interpretation put upon the document by the lower Court is to hold that the mortgage is irredeemable except at the option of the mortgagee, and this would constitute a clog on the equity of redemption which cannot be enforced. Consequently, if the language is ambiguous, I think that we must adopt an interpretation which would remove that clog. The document itself is an extraordinary document because it provides that on default by the mortgagee the mortgagor is to be penalized, and similarly if the mortgagee fulfils his bargain and the mortgagor commits default, the mortgagee is to be penalized by the compound interest being reduced to simple interest. However this may be, I think it is undoubted that there was an obligation on the mortgagee to execute this security bond, and consequently that obligation could be enforced by the other party to the contract. He was therefore entitled to demand a security bond before paying the money, and the execution of the security bond was not left to the will of the mortgagee to perform at any time he chose. If that is the correct view, the deposit of the mortgage money coupled with a request for the security bond is not a deposit coupled with a condition outside the contract, for the condition was one enforceable under the contract. The deposit was therefore a valid deposit under section 83.

There remains then the question whether the mortgage money ceases to bear interest from the date of deposit under the terms of section 84 of the Transfer of Property Act. Notice of the deposit was sent to the plaintiff, but he refused to accept the money and subsequently the first defendant withdrew the amount from Court. On similar facts it was held in *Krishnasami Chettiar v. Ramasami Chettiar*(1) that interest did not cease to

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run, the ground for the decision being that the deposit must be left in Court in case the mortgagee changes his mind. This decision is somewhat at variance with the decision in *Velayuda Nairicker v. Hyder Hussan Khan Sahib*(1), where it was held that once a tender had been made and refused, interest ceases to run, although in that case the money had been taken back from the mortgagor by the lender after refusal by the mortgagee. The decision in *Krishnasami Chettiar v. Ramasami Chettiar*(2) was considered in *Thevaraya Reddy v. Venkatachela Pandithan* (3), where AYLING and TYABJI, JJ., differed. The case went up in appeal and was decided in *Thevaraya Reddy v. Venkatachalam Pandithan*(4). I was one of the members of that Bench and dissented from the decision in *Krishnasami Chettiar v. Ramasami Chettiar*(2), and apparently ABDUR RAHIM, Offg. C.J., was inclined to the same view, although he held that it was not necessary to decide the point. On the other hand SESHAGIRI AYYAR, J., was of opinion that *Krishnasami Chettiar v. Ramasami Chettiar*(2) was rightly decided. The questions have been considered in *Hukam Singh v. Babu Lal*(5), and there a Bench of that Court followed my judgment in *Thevaraya Reddy v. Venkatachalam Pandithan*(4), and accepted the reasoning therein. I have very little to add to my judgment in that case, but I will add a few words regarding the decision in *Krishnasami Chettiar v. Ramasami Chettiar*(2), from which I venture to differ. In the judgment in that case the question was asked whether when the mortgagor had deposited the money and issued a notice to the mortgagee he had not done all that has to be done by him to enable the mortgagee to take the amount out of Court; and can he then withdraw the money even before the mortgagee appears to claim it? The answer was given in the negative; and a further question was asked why should he be at liberty to do so because the mortgagee appears and refuses to take it? The answer I would give to that question is that the mortgagee is under a duty to take the money when tendered and the cessation of interest on his refusal is a penalty for not performing his duty of submitting to redemption. A mortgagor might be able to collect the mortgage money and interest accrued to date of deposit, but unable to raise any more to meet further interest. Is he to be compelled either to forego his undoubted

(1) (1910) I.L.R., 33 Mad., 100.

(2) (1912) I.L.R., 35 Mad., 44.

(3) (1914) 1 L.W., 595.

(4) (1917) I.L.R., 40 Mad., 804.

(5) (1922) I.L.R., 44 All., 198.

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right to redeem, or else to leave his money lying idle, until the mortgagor chooses or is compelled to accept it? In the case of an usufructuary mortgage the injustice to the mortgagor is obvious as he is deprived of the benefit of his property and of his money. One consideration which appears to have escaped the notice of the learned Judges in that case is that if the mortgagor leaves his money in Court deposit after refusal by the mortgagee it might lapse to Government before the amount is withdrawn; who, in that case, is to bear the loss, the mortgagor or the mortgagee? In the present case the deposit was made in 1913 and this suit was not brought until 1922. If, therefore, the first defendant had left the money in deposit, the money would long ago have lapsed to Government. Section 84 is very clear and says that interest shall cease when once the mortgagor has done all that he can to enable the mortgagee to draw the money. When a mortgagee has received notice that the money is actually in Court and that he can draw it at that time, what more can be done by the mortgagor to enable him to draw it? Proceeding strictly on the interpretation of the section I still adhere to my opinion that *Krishnasami Chettiar v. Ramasami Chettiar*(1) is wrong and I am inclined to think that the legislature did not intend to make the law in India identical with the law in England. In England when a tender has been made it is also necessary that the mortgagor should always be ready to pay the amount, but the burden of proving that he is not so ready is on the mortgagee. I take it therefore that, when there has been a tender and there is no evidence of any subsequent refusal to pay, the provisions of the English law would be complied with, and the tender would be valid, except perhaps in cases where it was shown that the tenderer had subsequently derived profit from the money tendered.

As the question is one of some importance and there is a divergence of views in this Court, I think that the question should be referred for decision to a Full Bench. Accordingly the appeal is submitted to a Full Bench for decision.

The Memorandum of Objections is dismissed with costs.

ODGERS, J.—This was a suit for an amount due on a mortgage in default of payment, for sale. The first plaintiff and fourth defendant were brothers. The second plaintiff was son of first plaintiff and a minor at the date of suit. Defendants 1 to 3

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were brothers and undivided. In 1909 first plaintiff and fourth defendant sold some of their family properties to the father of defendants 1 to 3, and for the protection of the minor (second plaintiff) a mortgage bond Exhibit A was executed by the father of defendants 1 to 3 to the fourth defendant as head of his family. On a partition between fourth defendant and first plaintiff, the amount of the bond fell to share of plaintiffs 1 and 2. Two questions are raised in appeal to us (a) that the Subordinate Judge's construction of Exhibit A was wrong, (b) that interest on Exhibit A ceased by reason of a deposit by defendants 1 to 3 in Court under the terms of section 83, Transfer of Property Act. By Exhibit A the mortgagor undertook to repay "as soon as you execute and get registered before 14th September 1910 a security bond in respect of immovable properties estimated by the mediators at rupees six thousand in order that no disputes might arise in the matter of the said sale properties since there are included therein the properties given as security under a deed executed for rupees four hundred by you and your younger brother Arunachalam Pillai for and on behalf of the said minor Govindaswami also on 9th February 1908 to Peruvalandan Papavinasam Ayyangar, and get this back with endorsement of payment made thereon." The document proceeds "If security is not given before the said stipulated date, I shall, up to the date on which the security is given, add interest on principal and interest on interest at the said rate with twelve months' rests and pay you the amount of principal and interest accruing due in that manner, and take this back with endorsement of payment made hereon." Security was not furnished by the date named. The Subordinate Judge found that the delivery of the security bond to defendants was a condition precedent to the plaintiff's claim to the mortgage money and was prepared to hold that the suit was not maintainable owing to the failure of the plaintiffs to execute and deliver security bond according to the covenant in Exhibit A. The minor, however, having attained majority offered at the trial to recognize the mortgage as binding on him and to receive the amount due thereon and the Subordinate Judge "owing to the good sense displayed by both parties" proceeded to settle all questions arising on Exhibit A and decided that the deposit made by the defendant being conditional was invalid and that interest consequently did not cease to run. He gave a decree for plaintiffs for amount claimed subject to the deduction of the amount paid by defendants

1 to 3 to satisfy Papavinasam Ayyangar's decree (which had been obtained since the date of Exhibit A) which has now been agreed at Rs. 865 plus costs and 6 per cent interest. Under the circumstances it is perhaps unfortunate that the Subordinate Judge did not act on his first inclination and dismiss the suit. The clause as to the furnishing of the security bond seems to be clearly a clog on the equity of redemption as the mortgage money cannot be claimed without such bond and no time is provided within which (after 14th September 1910) such security bond is to be furnished and compound interest is to run "up to the date on which the security is given." Therefore interest is to run on for any length of time until the mortgagee thinks fit to render himself competent to accept it by executing the security bond. This appears to render the clause invalid. The minor has, however, become a major and has offered to accept the mortgage money. The real question is, therefore, the second, the question as to the deposit. On 6th August 1913 the father of defendants 1 to 3 deposited the necessary amount in Court and tendered it to fourth defendant who however refused to take it out, whereupon the Court referred the father of defendants 1 to 3 to a regular suit by its order, dated 15th November 1913. The Subordinate Judge held that the tender was not unconditional because defendants 1 to 3 requested that fourth defendant should first furnish security as provided for in Exhibit A before he drew the money. The Subordinate Judge holds that the condition is against the terms of Exhibit A. This I am unable to understand as the money can clearly not be taken by the mortgagee unless and until a security bond is provided as stated in Exhibit A. I do not see how under the circumstances this can be regarded as a conditional deposit so as to render the deposit invalid. The main question argued before us however was as to the consequent cessation of interest for another reason, viz., that although defendants made a deposit and kept the money in Court for about a year, they subsequently withdrew it. This is a pure question of law on which there is some apparent conflict of opinion.

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Section 84, Transfer of Property Act, reads as follows:—
"When the mortgagor or such other person as aforesaid has tendered or deposited in Court under section 83 the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender or as soon as the

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mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of Court, as the case may be," the relevant words to the present case being in the last clause.

In *Velayuda Naicker v. Hyder Hussan Khan Sahib*(1), a case of tender, the Court held that "tender" does not imply that the tenderer must always be ready to pay and that the cases to the contrary in the English law and in Calcutta did not apply. There does not appear to be any distinction drawn in the section between tender and deposit. In *Krishnasami Chettiar v. Ramasami Chettiar*(2), a case of deposit, it was held that a continuance of the deposit was necessary to obtain the benefit of the section. The English cases as to the necessity for continued readiness to pay in the case of tender were relied on and the case in *Velayuda Naicker v. Hyder Hussan Khan Sahib*(1) distinguished on the ground that there was there no allegation of a subsequent demand by the mortgagee for the amount and that mortgagor failed to pay and also because the matter was clearer as regards deposit as distinguished from tender. "We cannot speak of a person having deposited in Court if he has withdrawn his deposit."

In *Thevaraya Reddy v. Venkatachela Pandithan*(3), a case heard by AYLING and TYABJI, JJ., there were disputes among the mortgagee's representatives, and the money deposited was not taken out for a year after which the mortgagors withdrew it. AYLING, J., thought that *Krishnasami Chettiar v. Ramasami Chettiar*(2) governed the case and that the ruling should be sustained in the absence of a reference to a Full Bench. TYABJI, J., on the other hand, thought the ruling in *Krishnasami Chettiar v. Ramasami Chettiar*(2) was wrong and that *Velayuda Naicker v. Hyder Hussan Khan Sahib*(1) was the correct view on the ground that it was not shown that the English law differed from the Indian law and that the English law makes a tender perfect and complete unless the party impeaching its completeness shows an absence of readiness to pay. He examined the English law and added that the facts in *Krishnasami Chettiar v. Ramasami Chettiar*(2) and in the case before him were different. On this difference of opinion a Letters Patent Appeal was taken and the decision is

(1) (1910) I.L.R., 33 Mad., 100.

(2) (1912) I.L.R., 35 Mad., 44.

(3) (1914) 1 L.W., 595.

reported in *Thevaraya Reddy v. Venkatachalam Pandithan*(1). It was heard by a Bench of three Judges of whom my learned brother was one. ABDUR RAHIM, Offg. C.J., held that the interpretation of section 84 in *Krishnasami Chettiar v. Ramasami Chettiar*(2) was that "The deposit in order to be effective under section 84 must remain in Court until the mortgagee or his successor in interest has been enabled or is in a position to withdraw it." SESHAGIRI AYYAR, J., held that *Krishnasami Chettiar v. Ramasami Chettiar*(2) was rightly decided. PHILLIPS, J., on the other hand thought that this decision was wrong. He said "the cessation of interest is the penalty imposed upon the mortgagee for refusal to accept the money when offered and this penalty is not remitted because he changes his mind when it is too late." The learned Judges, however, held that, in the case before them, the circumstances were different and as the mortgagors failed to have the deposit in Court sufficiently long to enable the mortgagees to draw the amount they failed to do all they had to do under the section.

This opinion of PHILLIPS, J., in *Thevaraya Reddy v. Venkatachalam Pandithan*(1) has recently been approved by the Allahabad High Court in *Hukam Singh v. Babu Lal*(3). The English law is set forth *inter alia* in *Bank of New South Wales v. O'Connor*(4).

In Fisher on Mortgages (Sixth Edition), section 1851, it is stated that "interest will cease to run upon the mortgage debt from the time at which a proper tender of the whole amount is shown to have been made. But it ought to appear, that from the time of the tender the money was kept ready by the mortgagor, and that no profit was afterwards made of it; upon proof of the contrary whereof the interest will still run." The principle in English law being apparently that if the mortgagor was to have the benefit of cessation of interest on the mortgage, he must not have earned interest on the money elsewhere in the meantime.

In this state of the authorities, I think it is desirable that the point should be settled. The point is essential to the appeal which therefore should be referred to a Full Bench as proposed by my learned brother.

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(1) (1917) I.L.R., 40 Mad., 804.

(2) (1912) I.L.R., 35 Mad., 44.

(3) (1922) I.L.R., 44 All., 193.

(4) (1889) 14 App. Cas., 273.

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ON THIS REFERENCE

K. S. Krishnaswami Ayyangar for appellants.—On the facts of the case my insistence on the giving of security at the time of deposit was proper. As the mortgagee was at fault in not taking the deposit he is not entitled to subsequent interest though I withdraw the same. After such a deposit there is a presumption that I continued ready and willing to pay; see *Kinnaird v. Trollope*(1). The English law and the Indian law are alike. Moreover I specifically pleaded in this case my continued readiness and willingness to pay and that has not been denied by the mortgagee.

K. Rajah Ayyar for *N. S. Srinivasa Ayyar* and *S. V. Narayana Ayyar* for respondents.—Deposit and tender have the same effect and both must be continuous if the interest is to cease.

[CHIEF JUSTICE.—If both are alike, then why cannot the mortgagor withdraw the deposit and revert to tender and say that he was ever ready to tender and pay?]

The deposit in Court must continue and withdrawal takes away the effect of tender; *Krishnasami Chettiar v. Ramasami Chettiar*(2). In the case of tender the onus of proof of continued readiness and willingness is on the mortgagor; see *Harris on Tender*, page 92; 21 Halsbury, 149. Withdrawal of deposit shows an intention to utilize the money and is proof of un readiness to pay; *Edmondson v. Copland* (3). He explained *Kinnaird v. Trollope*(1). Interest will cease only during the time the deposit was actually in Court and not after it was withdrawn. There is no power to withdraw the deposit from Court; nor have I any power to ask him to re deposit the amount. A valid tender before suit must be followed by payment in Court. *Haji Abdul Rahman v. Haji Noor Mahomed*(4). Neither the question of onus nor the question of continued readiness to pay has been dealt with by the lower Courts in this case.

JUDGMENT.

In our opinion a deposit in Court under section 84 is only a special kind of tender, designed to make available a sure mode of proof to the mortgagor of the fact

(1) (1889) 42 Ch. D., 610.

(3) [1911] 2 Ch., 301.

(2) (1912) I.L.R., 35 Mad., 44.

(4) (1892) I.L.R., 16 Bom., 141.

that he has made a tender. If he tenders in the ordinary way and that tender is denied, he may be defeated by false evidence; if he tenders by deposit in Court, the matter is proved for him by the record.

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We do not agree with the view of PHILLIPS, J., that once the money is deposited and a reasonable time given to the mortgagee to take it out, interest thereafter cannot be allowed in any circumstances. Nor do we agree with the view apparently adopted in *Krishnasami Chettiar v. Ramasami Chettiar*(1) that if after depositing the money in Court, the mortgagor withdraws it, his original deposit is to be treated as a nullity; in other words, that he is to be regarded as never having tendered at all.

In our opinion the deposit operated as a tender, and the only question properly arising was whether the mortgagor, notwithstanding his withdrawal, remained ready and willing to pay, throughout. The better opinion seems to be that the fact of the tender raises the presumption that the debtor continued ready and willing to pay, and that the burden is cast upon the creditor to show that he was either not willing or not able to pay because he had utilized the moneys for other purposes. And it may be that the fact of withdrawal might, in certain circumstances, in itself be some evidence of unwillingness to pay. But however that may be, here there was an allegation in paragraph 6 of the written statement that the defendants had always been ready and willing to pay.

On that no issue was raised and in our view that is sufficient to conclude the matter in the defendants' favour, and to preclude the plaintiffs (who have no

(1) (1912) I.L.R., 35 Mad., 44.

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merits) from claiming interest after the date of the deposit in Court.

The decree will be drawn up accordingly and must give credit for the sum of Rs. 865 with costs and interest referred to by ODGERS, J.

Defendants will have the costs of the appeal.

N.R.

APPELLATE CIVIL—FULL BENCH.

*Before Mr. Justice Phillips, Mr. Justice Krishnan
and Mr. Justice Ramesam.*

SUBBARAYADU (DEFENDANT), PETITIONER,

1923,
May 18.

v.

RAMASWAMI AND TWO OTHERS (PLAINTIFFS)
RESPONDENTS.*

*Sec. 8, exception to, of Madras Estates Land Act (I of
1908)—“Acquired,” meaning of—.*

The word “acquired” in exception to section 8 of the Madras Estates Land Act includes a case of “surrender” of his right by the occupancy ryot to the inamdar; hence after such surrender the land ceases to be part of the estate and a suit for rent thereof in a Civil Court is competent. The words “or otherwise” in section 8 (1) of the Act are not *ejusdem generis* with “transfer” and “succession.”

Per Cur. A case of “abandonment” stands on the same footing as “surrender.”

PETITION under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the decree of K. SUNDARAM CHETTI, Subordinate Judge of Guntūr, in A. S. No. 44 of